CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 57

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., PETITIONER,

vs.

UNIVERSAL INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

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[fol. 1] [Caption omitted]

IN COURT OF COMMON PLEAS OF BALTIMORE CITY

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., a Body Corporate,

vs.

UNIVERSAL INSURANCE COMPANY, a Body Corporate

[fol. 2] DECLARATION

Lanasa Fruit Steamship and Importing Company, Inc., a body corporate, plaintiff, by George Forbes and Henry L. Wortche, its attorneys, sues Universal Insurance Company, a body corporate, defendants:

For money payable by the defendant to the plaintiff.

1. For goods bargained and sold by the plaintiff to the the defendant.

2. And for work done and materials provided by the plaintiff for the defendant, at its request.

3. And for money lent by the plaintiff to the defendant.

4. And for money paid by the plaintiff for the defendant, at its request.

5. And for money received by the defendant for the use of the plaintiff.

6. And for money found to be due from the defendant to the plaintiff on accounts stated between them.

7. And for that the plaintiff was the owner of a cargo of bananas aboard the Nowegian Steamship "Smaragd", at the time of her stranding hereinafter mentioned; that on the 23rd day of June, 1933, the defendant, in consideration of an agreed premium, to it paid, executed and delivered to the Lanasa Fruit Importing Company, Inc., an open policy of insurance, and by endorsement of April 23rd, 1934, the interest in said policy was vested in the plaintiff, which policy is hereunto attached, upon all cargoes of bananas and fruit imported by the plaintiff from West Indian ports to Baltimore on vessels designated by

the plaintiff, whereby the defendant promised to pay the plaintiff, on damage accruing to it by reason of destruction of or injury to the said cargoes of bananas and fruit so imported by plaintiff, whether by perils of the sea, or [fol. 3] by fire or explosion, or by stranding, or by any other instances therein mentioned, not in excess of $35,000.00; that the plaintiff was the owner of the cargo of bananas aboard the Norwegian Steamship "Smaragd", which cargo was insured by the defendant under the policy aforesaid, and while said vessel was proceeding up the Chesapeake Bay to Baltimore on the 21st day of July, 1935, and while said policy was in full force and effect, the said Steamship "Smaragd" went aground and stranded off Seven Foot Knoll, in the Chesapeake Bay, and before she could be floated the entire cargo of bananas thereon became overripe and rotted, causing a total loss of said cargo of bananas to the plaintiff, which loss was due to a cause insured against under said policy; that the plaintiff's loss was $20,229.00, per account attached; that the plaintiff has furnished the defendant with proof of its loss and interest, and has otherwise duly performed all the conditions of the policy on its part to be performed; and has made frequent demands upon the defendant for the payment of its loss, as aforesaid, but the defendant has refused and neglected to pay the same, and still neglects and refuses to pay the same, to the great damage of the plaintiff.

Wherefore, the plaintiff brings this suit and claims Twenty-five thousand Dollars ($25,000.00) damages.

George Forbes, Henry L. Wortche, Attorneys for plaintiff.

Duly sworn to by Antonio Lanasa. Jurat omitted in printing.

[fol. 4] IN COURT OF COMMON PLEAS OF BALTIMORE CITY

[Title omitted]

And the plaintiff elects to have this case tried before a jury.

George Forbes, Henry L. Wortche, Attorneys for Plaintiff.

[fol. 5] EXHIBIT TO DECLARATION

Ocean Cargo

No. 12872

Universal Insurance Company,

Newark, New Jersey,

Talbot, Bird & Co., Inc.,

General Managers

51 Beaver Street, New York, N. Y.

On Account of Form —

Lanasa Fruit Importing Company, Inc., and/or as Agents

In case of loss, to be paid to form .....
Do make Insurance and cause themselves to be insured, lost or not lost, at and from upon all kinds of lawful goods and merchandises, laden or to be laden on board the good ..... form .....
whereof is master for this present voyage .....
or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof on board of the said vessel, at .....
form ..... as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at ..... form ..... as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said goods and merchandises, hereby insured, are valued (premium included) at .....
form .....

Touching the adventures and perils which the said Universal Insurance Company is contented to bear, and take upon itself, in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, assailing thieves, jettisons, [fol. 6] letters of mart and counter-mart, reprisals, takings at sea, arrests, restraints and detainments of all kings,

princes, or people, of what nation, condition or quality soever, barratry of the Master and Mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said Universal Insurance Company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance by the assured or his or their assigns, at and after the rate of ..... As Agreed .....

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the property hereby insured (the amount of premiums, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to five per cent. Provided a-ways, and it is hereby further agreed, that if the said assured shall have made any other insurance upon the interest aforesaid, prior in day of date to this Policy, then the said Universal Insurance Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the interest hereby insured; and the said Universal Insurance Company shall return the premium upon so much of the sum by them insured as they shall be exonerated from, by such prior insurance. And in case the assured shall have made any insurance (other than fire) upon the said interest, subsequent in day of date to this Policy, the said Universal Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled [fol. 7] to retain the premium by them received, in the same manner, as if no such subsequent insurance had been made. And in case the assured shall have made any insurance (other than fire) upon the interest aforesaid of date the same day as this Policy it shall be deemed simultaneous

herewith, and the said Universal Insurance Company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It Is Also Agreed, that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war. "It is also agreed that if any goods, etc., lost or damaged be shipped under an Insured Bill of Lading, or if the rate of freight thereon includes insurance, or in case any agreement be made or accepted, by the assured with any carrier or bailee by which it is stipulated that such or any carrier or bailee shall have, in case of any loss for which any carrier or bailee (or their underwriter) may be liable, the benefit of any insurance effected by the assured, then and in that event this policy shall be void as regards any liability for such loss hereunder, but this Company in these and all cases of loss or damage by perils insured against shall be liable and owe actual payment for (only) what cannot (and could not in the absence of this insurance) be collected from carriers and/or bailees of property lost or damaged, and/or their insurers, and also shall be chargeable with the direct pecuniary loss to the assured temporarily arising from delay in collection from said carriers and or bailees and/or insurers; and the advancing (for the purpose only of avoiding such pecuniary loss) of funds to the assured for his protection pending such delay, shall in no case be considered as affecting the question of the final liability of this Company, and as soon as collection is made from carriers and/or bailees and/or insurers, the assured shall retain only such proportion of the sum or sums so advanced by this Company as will, with the amount collected from carriers and/or bailees and/or insurers, make up the sum of the assured's loss, and the balance, of such sum or sums as may have been advanced by this Company shall thereupon be paid back to this Company; but if no such collection can be made from carriers and/or bailees and/or insurers; the assured shall [fol. 8] retain so much of said sum or sums which may have been advanced by this Company as shall not exceed the actual liability of this Company thereby established (provided always, the loss shall constitute in other respects a claim under this insurance)."

It is Warranted by the assured or those acting in their behalf that there shall be no waiver, transfer or any action tending to defeat or decrease any claim against the carrier or other person or persons whether before or after the insurance is effected under this policy.

It is Warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to the Universal Insurance Company. It is also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade, but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

Memorandum.—It is also agreed that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging and other articles used for bags and bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent, unless general; and sugar, flax, flax-seed and bread, are warranted by the assured free from average under seven per cent, unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent, unless general.

It is Warranted by the assured, free from damage or injury from dampness, change of flavor or being spotted, discolored, musty or moldy, except caused by actual contact of [fol. 9] sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery or other hardware, and on shipments from ports and places East of the Cape of Good Hope, on gunny cloth, gunny bags or hides, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, so far as practicable. Not liable for leakage on molasses or other liquids, nor for breakage, unless occasioned by stranding

or collision with another vessel. And it is also agreed that in case of loss or damage to any part of a machine, consisting, when complete for sale or use, of several parts, the Universal Insurance Company shall only be liable for the insured value of the part lost or damaged.

It is especially agreed that when, by its terms, this insurance includes risk while on railroad and/or dock, wharf, quay, or elsewhere on shore, this company is only to be liable for loss or damage by fire, collision or derailment, while on railroad, and only by fire or flood (meaning rising, navigable waters), when elsewhere on shore unless otherwise provided for herein.

All risks insured as under-deck unless otherwise specified in this Policy.

Cargo on deck free from claim for loss by wet, breakage, leakage or exposure.

In case of damage from perils insured against, affecting labels only, loss to be limited to an amount sufficient to pay the cost of new labels and relabeling the goods, provided same amounts to a claim under the terms of the Policy.

This Company is not liable for any loss, damage or expense in consequence of sweat, or heating of the vessel's hold.

It is Warranted by the assured, that vessels to be loaded with grain from the ports of New York, Boston, Philadelphia, Baltimore, or San Francisco for Foreign Ports, are to be loaded under the inspection of the Surveyor of the Board of Underwriters, or of a Surveyor appointed by the Uni- [fol. 10] versal Insurance Company, and his certificate as to their proper loading and seaworthiness obtained, or the insurance under this Policy to be void.

No suit or action on this Policy for the recovery of any claim, shall be sustainable in any Court of law or equity unless the insured shall have fully complied with the terms and conditions of this Policy, nor unless commenced within twelve (12) months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State wherein this policy is issued, then and in that event no suit or action under this Policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

This insurance not to attach or be liable for more than $..... form ..... by any one vessel

at any one time, unless otherwise agreed upon at time of endorsement. Risks applicable hereto to be reported as soon as known to assured.

Proof of loss to be authenticated by the Agent of the Universal Insurance Company, if there be one at the place where such proofs are taken; otherwise by the Correspondent of the Board of Underwriters of New York if there be one, otherwise by Lloyds Agent.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this Policy, then there shall be no return of premium on account of such termination of the voyage.

Either party at liberty to cancel upon giving ..... form ..... written notice to that effect, but without prejudice to any risk, pending at the termination of that period.

In Witness Whereof, the said Universal Insurance Company has caused this Policy to be signed by its President and attested by its Secretary, at its office in the City of Newark, and State of New Jersey, and this Policy is made and accepted upon the above expressed conditions, but shall [fol. 11] not be valid unless countersigned by Talbot, Bird & Co., Inc., General Managers of the Company.

Samuel Bird, President. John F. Byrne, Secretary.

Countersigned at New York, N. Y., this 23rd day of June A. D. 1933.

Universal Insurance Company; Talbot, Bird & Co., Inc., General Managers. James J. Manton, Atty.

It is warranted by the assured; free from claim on account of capture, seizure, arrest, restraint, and/or detainment, or for loss, damage, destruction or expense, which may be attributed to or arise from the act of any person or persons acting or claiming to act under authority from any country or people, whether before or after declaration of war; and free from the consequences thereof or any attempt thereat.

Free from any claim for loss, damage, destruction or expense in consequence of hostilities and/or warlike operations, revolutions, internal commotion, civil commotion, insurrection, riots, and acts of strikers, locked-out workmen or persons taking part in labor disturbances.

Warranted free of any claim based upon loss of or frustration of, the insured voyage, or adventure, caused by arrests, restraints or detainments of kings, princes, or peoples.

Lanasa Fruit Importing Company, Inc. and/or as Agents

For account of whom it may concern:

Loss, if any payable to Assured or order.

[fol. 12] On merchandise consisting principally of Fruit (Including Cocoanuts).

Special conditions Under Deck: Warranted free from particular average unless the vessel or craft be stranded, sunk, burnt, but the Assurers are to pay the insured value of any package or packages which may be totally lost in loading tran-shipment or discharge, also any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyances with any external substance (ice included) other than water, or to discharge of cargo at a port of distress, also to pay landing, warehousing, forwarding and special charges, if incurred.

(Imports) to cover all shipments consigned to assured or to others for their account or control or in which they have an interest, to the extent of that interest, also to cover all shipments, which they may have instructions to insure, providing such instructions are given in writing prior to sailing of vessel and before any known or reported loss or accident; excluding such shipments as are insured by shipper, and so advised in writing prior to sailing of vessel and before any known or reported loss or accident.

(Exports) to cover all shipments made by assured or by others for their account or control or in which they have an interest, to the extent of that interest, also all shipments in respect to which they have received instructions to insure, excluding such shipments as the assured are instructed not to insure, such instructions in either or both cases being given in writing prior to sailing of vessel and before any known or reported loss or accident.

Valued at premium included at invoice value (foreign currency in invoice to be converted into United States Dollars at Federal Reserve rate of exchange prevailing on date of sailing of Steamer) plus charges incurred up to time of completion of loading into ship, commissions, prepaid and/or

advanced and/or guaranteed freight and/or charter hire, if any, and 75% added thereto.

[fol. 13] Per iron and/or steel steamer and/or steamers, motor ships, excluding sailing vessels with or without auxiliary engines, and connecting conveyances.

At and from ports and/or interior places in the West Indies to ports and/or interior places in the United States, direct or otherwise, including risk of tran-shipment, if any, and lighterage whether customary or otherwise.

To attach and cover on all goods shipped on and after June 21st, 1933. Policy to be continuous until cancelled by either party giving the other 30 days notice in writing, such cancelment, however, not to prejudice any risk then pending.

To attach and cover, if at the risk of the assured, from the moment the merchandise leaves store, warehouse or factory at port or place of shipment (whether at interior or at seaboard) and to cover continuously thereafter, while in due course of transit, until safely delivered at store, warehouse or factory at port or place of final destination, including inland transportation and while on docks, wharves, quays and while in Appraisors' stores and/or Custom House for examination; but not to cover in any other store or warehouse.

On Shipments to River Plate ports the risk of fire under this Policy shall cease upon arrival at any shed (transit or otherwise), store, custom house, warehouse, or upon the expiry of ten days subsequent to landing, whichever may first occur.

It is hereby understood and agreed that shipments to Japan are covered subject to the following clause:

Notwithstanding anything to the contrary contained herein the risk under this insurance shall cease fifteen (15) days after arrival of the goods at or in Customs compound or other premises used for Customs purposes, but in no event shall this insurance cover either after arrival of the goods at premises used by the consignee or other party of interest, or their agents, for storage purposes, or for more than twenty (20) days after discharge from ocean steamer, whichever may first occur.

[fol. 14] In the event that a longer period of protection than that specified in the preceding clause be required at time of shipment an additional premium to be named at time of shipment shall be charged for each 15 days (or part

thereof) granted in excess of the periods named in the preceding clause.

Goods insured hereunder by land conveyances are covered against loss or damage caused by fire, collision, and derailment, and while on docks or elsewhere on shore, against the risks of collapse and/or subsidence of docks, wharves, quays, also fire, floods (meaning the rising of navigable waters); unless otherwise provided for herein.

Shipments on deck to be insured: Free of Particular Average unless caused by the vessel being stranded, sunk, burnt, on fire, or in collision, but including jettison and/or washing overboard, irrespective of percentage.

Held covered at a premium to be arranged in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel or voyage, provided same be communicated to the assurers as soon as known to the assured.

Including all liberties as per contract of affreightment. The assured are not to be prejudiced by the presence of the negligence and/or latent defect clause in the Bills of Lading and/or Charter Party.

The risks covered by this policy are to include loss, damage or expense resulting from explosion, howsoever or wheresoever occurring, provided same is shown not to have been caused by or attributable to any of the risks excluded by the terms of the F. C. & S., or S. R. & C. C. Clause.

Including risks of craft to and from the vessel each lighter, craft or conveyance, to be considered as if separately insured, and to pay for total loss of any package or packages, whilst loading, transshipping or discharging. Also to cover any special or supplementary lighterage to take the goods [fol. 15] to or from the warehouse. The assured are not to be prejudiced by any agreement exempting lightermen from liability.

General average and salvage charges payable according to Foreign Statement or according to York-Antwerp Rules, if in accordance with the Contract of affreightment.

Seaworthiness of vessel as between the Assured and Assurers is hereby admitted.

It is warranted by the assured to report all Export shipments hereunder to Messrs. J. Ramsay Barry & Co., Baltimore, Md., for transmission to Talbot, Bird & Company, Inc., 51 Beaver Street, New York City, within forty eight

(48) hours after sailing of vessel (Sundays and Holidays excepted) or as soon thereafter as may be practicable.

It is warranted by the assured to report all Import shipments hereunder to Messrs. J. Ramsay Barry & Co., Baltimore, Md., for transmission to Talbot, Bird & Company, Inc., 51 Beaver Street, New York City, as soon as practicable after they have knowledge thereof.

Held covered in the event of the goods (or any part thereof) hereby insured, being shut out and/or transferred to another vessel or vessels. In the event of the goods or any part thereof being carried on or beyond the port of destination, the assurers hereby agree to hold the assured covered until final arrival and delivery of the goods at their proper port of destination and delivery as herein provided. Notice to be given this Company as soon as known to the assured.

This company shall not be liable for more than Thirty Five Thousand ($35,000) Dollars by any one vessel or conveyance or in any one place at any one time, unless otherwise agreed upon, in respect to shipments on deck it is understood and agreed that this Company shall not be liable for more than Five Thousand ($5,000) Dollars.

Rates as per schedule attached. Premiums payable monthly in cash.

[fol. 16] Attached to and forming part of Policy No. 12872 of the Universal Insurance Company.

Universal Insurance Company; Talbot, Bird & Co., Inc., General Managers. James J. Manton, Atty.

New York, April 23, 1934.

Endorsement to be attached to and made part of Policy No. 12872 of the Universal Insurance Company, Newark, N. J., issued to Lanasa Fruit Importing Co., Inc., on the

It is hereby understood and agreed that on and after April 20, 1934, interest in this policy is vested in Lanasa Fruit Steamship and Importing Company, Inc.

Talbot, Bird & Co., Inc., (Sgd.) James J. Manton.

All other terms and conditions of the policy remaining unchanged.

Baltimore, Maryland, July 30, 1935.

Universal Insurance Company, a Body Corporate,

Dr. to

Lanasa Fruit Steamship & Importing Co., Inc.

To loss on 28,587 bunches of bananas ex S. S. Smaragd, July 21, 1935	$11,559.43
Plus 75% as per policy	8,669.57
Total amount of loss	$20,229.00

[fol. 17] IN UNITED STATES DISTRICT COURT, DISTRICT OF MARYLAND

PLEAS TO DECLARATION—Filed January 3, 1936

The defendant, Universal Insurance Company, by Ritchie, Janney, Ober & Williams, its attorneys, for pleas to the plaintiff's declaration and to each and every count thereof says:

1. That it never promised as alleged.

2. And for a second plea, that it never was indebted as alleged.

3. And for a third plea, that on or about April 4, 1934, in consideration of an increased premium, its policy of insurance referred to in the plaintiff's declaration was extended by indorsement at the request of the plaintiff to cover loss by decay, injury or damage to fruit in consequence of delay resulting from standing. Said indorsement was in the form annexed hereto marked "Exhibit A", and made a part hereof as fully as if set forth at length herein. And that on or about January 16, 1935, and before the stranding alleged in the declaration, the coverage against damage in consequence of delay granted by said indorsement dated April 4, 1934, was cancelled by indorsement dated January 25, 1935, which provided—

"It is hereby understood and agreed that indorsement attached to this policy dated April 4, 1934, is cancelled in respect of shipments made on and after January 16, 1935 and thereafter this policy covers the same as prior

to the attachment of that indorsement, and the rate is reduced from 60¢ to 25¢."

4. And for a fourth plea, that said policy of insurance referred to in the plaintiff's declaration contained and was issued subject to the following express warranty.

"It is warranted by the assured, free from damage or injury from dampness, change of flavor or being spotted, discolored, musty or mouldy, except caused by actual con-
[fol. 18] tact of sea water with the articles damaged, occasioned by sea perils."

And that the loss and damage alleged in the plaintiff's declaration consisted of damage from the bananas being spotted, discolored, musty or mouldy, and that said damage was not caused by contact of sea water with the bananas.

Ritchie, Janney, Ober & Williams, Attorneys for Defendant.

STATE OF NEW YORK,
County of New York, ss:

I hereby certify, that on this 30th day of December, 1935, before me, the subscriber, a Notary Public of the State of New York, in and for the County of New York, personally appeared Harry Bird, Vice-President of Universal Insurance Company, the defendant in the above entitled cause, and on behalf of said defendant corporation made oath in due form of law that every one of the foregoing pleas pleaded by said defendant corporation is true; and further that the said defendant corporation does not admit nor does he as vice-president thereof admit any part of the plaintiff's demand to be due or owing, but that he and said defendant corporation dispute the whole of said amount. And further, that he, the affiant, verily believes that the defendant, corporation will be able at the trial of the cause, to produce evidence to support the said pleas as to the whole of the plaintiff's said demand so disputed, and that he is advised by counsel and that the said defendant corporation is also advised by counsel, to file the said pleas.

Harry Bird.

Subscribed and sworn to before me this 30th day of December, 1935. Charles Rosebrock, Notary Public. (Notary's Seal.)

[fol. 19] I, Frank B. Ober, a member of the firm of Ritchie, Janney, Ober & Williams, hereby certify that I advised Harry Bird, Vice President of Universal Insurance Company, defendant in the above entitled cause, and also advised said Universal Insurance Company to file the foregoing pleas and that I advised said Harry Bird, Vice-President, of said defendant company, to make the aforegoing affidavit.

Frank B. Ober.

EXHIBIT "A" TO PLEAS

April 4th, 1934.

Endorsement to be attached to and made part of Policy No. 12872 of the Universal Insurance Company of Newark, N. J., issued to Lanasa Fruit Importing Company Inc.

It is hereby understood and agreed that effective as to all shipments made on and after date this policy is amended to cover as follows:

Free of particular average unless the vessel be stranded, sunk, burned, on fire or in collision, in any, all or several of which events the insurers are liable for such loss by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom. Insurers are liable also for such loss in consequence of delay resulting from any, all or several of the following causes; i. e. breakage of shaft, loss of blades from propeller, derangement or breakage of machinery, derangement or breakage of rudder and/or sternpost, whether or not the vessel be stranded, sunk, burned, or in collision, provided that in all cases the loss amounts to 10% after deducting 5% for ordinary loss.

The foregoing conditions shall apply to the vessel carrying or due to carry the cargo insured hereunder.

It is further understood and agreed that the risks insured by this policy shall attach from the time the mer-[fol. 20] chandise and/or goods becomes at risk of the assured in interior (but in no event to cover uncut fruit), it being understood and agreed that in the event of stranding, sinking, burning or collision of the vessel, breakage of machinery, derangement or breakage of rudder and/or sternpost (whether or not vessel be stranded, sunk, burned on fire or in collision) prior to arrival at port of shipment

and/or previous to loading of cargo, insurance attaches only on such interest at risk not exceeding fifty (50) hours prior to due loading date.

Insurance to cover continuously thereafter in due course of transit subject to the full terms of the policy until discharged at final port of destination but including risks of craft and/or lighter to and from the vessel. Each craft and/or lighter to be deemed a separate insurance.

All other terms and conditions remaining unchanged.

Talbot, Bird & Co., Inc.

IN UNITED STATES DISTRICT COURT

JOINDER OF ISSUE ON FIRST AND SECOND PLEAS OF DEFENDANT AND DEMURRER TO THIRD AND FOURTH PLEAS—Filed January 7, 1936

The plaintiff, Lanasa Fruit Steamship and Importing Company, Inc., a body corporate, by George Forbes and Henry L. Wortche, its attorneys, joins issue on the first and second pleas of the defendant, and demurs to the third and fourth pleas for the following reasons:

1. That the third and fourth pleas of the defendant are bad in substance and insufficient in law.

2. That the said third and fourth pleas of the defendant amount to the general issue plea.

3. That the third plea of the defendant sets fourth no pleadable defense to the action of the plaintiff herein.

[fol. 21] 4. That the third plea of the defendant pleads as a defense a matter not a part of the contract sued on, as will be seen from the face of the plea.

5. That the fourth plea of the defendant does not negative other sea perils, and particularly stranding, as set forth in the plaintiff's declaration.

6. That the defense under the fourth plea, if sound, can be raised under the general issue plea.

7. And for other causes to be shown at the hearing.

George Forbes, Henry L. Wortche, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

At Law. #5801

LANASA FRUIT STEAMSHIP & IMPORTING COMPANY, INC.,

vs.

UNIVERSAL INSURANCE COMPANY

Baltimore, Maryland, June 12, 1936.

Hearing on Demurrer to Third and Fourth Pleas, Before Judge William C. Coleman

Appearances:

Messrs. George Forbes and Henry L. Wortche, on behalf of plaintiff.

Messrs. Ritchie, Janney, Ober & Williams (by Mr. Frank B. Ober and Mr. Southgate L. Morison), on behalf of defendant.

[fol. 22] OPINION (Oral)—June 12, 1936

COLEMAN, District Judge:

The question presented involves the interpretation of a policy of marine insurance issued by the defendant to the plaintiff covering a cargo of bananas shipped aboard the Norwegian Steamship Smaragd in July, 1935, from Cuba to Baltimore. The vessel was stranded coming up Chesapeake Bay, and before she could be floated, the entire cargo of bananas became overripe and rotted, resulting in total loss. The plaintiff furnished the requisite proof of loss but defendant has refused to pay on the ground that the direct cause of the damage to the cargo was the delay resulting in the stranding, and that such is not covered by the policy in suit.

The defendant has filed general issue pleas and two special pleas, the first setting up a rider on the policy which, however was cancelled prior to the stranding, under the terms of which the policy was made expressly to cover damage in consequence of delay due to stranding and various other causes. The second special plea set up a

warranty contained in the policy exonerating the defendant from liability from certain damage referred to in the warranty. The plaintiff has joined issue on the general issue pleas and has demurred to the special pleas. A hearing has been had on the demurrer, the principal grounds of which are set forth in the course of this opinion.

I reach the conclusion that the demurrer must be overruled in this case because I think the first special plea is good. I find it unnecessary to rest this case on any other ground than that the rider, which was in the policy originally, but was struck out prior to the stranding which is the cause of the present controversy, is the best and, I think, conclusive evidence of the interpretation which must be given to the other clauses of the policy, to wit, an interpretation in favor of the defendant.

Because of this view which I take of the case, it becomes unnecessary for me to go into any lengthy analysis or consideration of differences, if such there be, between the [fol. 23] British and American authorities. I will say, parenthetically, however, that it seems to me to be very clearly established that unless such liability is expressly assumed in a policy of this kind, an insurance company is not liable for loss due to the inherent nature of the goods, or to delay; and, as I think the defendant has properly stated, this principle is applicable where perishable goods have wholly or partially deteriorated through delay in the voyage, even though such delay was directly caused by the perils of the sea. I believe that to be not only the weight of the English authorities, but to be consistent with such American authorities as there are with the possible exception of the Corsicana case, (Brandyce vs. United States Lloyd's Inc., 1924 A. M. C. 365; 203 N. Y. Supp. 10; 239 N. Y. 573). See Taylor vs. Dunbar L. R. 4 C. P. 206; Pink vs. Fleming, L. R. 25, Q. B. D. 396; Perry vs. Cobb, 88 Me. 435.

But, as I have just stated, I do not think it is necessary for me to attempt to determine whether the decision in the Corsicana case is directly contrary to the weight of authority either in England or in this country, because I rest the present case on the narrower ground just indicated.

The rider which was struck out, unquestionably covered delays due to stranding, by the following language:

"It is hereby understood and agreed that effective as to all shipments made on and after date this policy is amended to cover as follows:

Free of particular average unless the vessel be *stranded,* sunk, burned, on fire or in collision, *in any, all or several of which events the insurers are liable for such loss by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom.* Insurers are liable also for such loss in consequence of delay resulting from any, all or several of the following causes; i. e. breakage of shaft, loss of blades from propeller, derangement or breakage of machinery, derangement or breakage of rudder and/or sternpost, whether or not the vessel be stranded, sunk, burned, or in collision, provided that in all cases the loss amounts to 10% after deducting [fol. 24] 5% for ordinary loss. The foregoing conditions shall apply to the vessel carrying or due to carry the cargo insured hereunder." (Italics inserted.)

It is true that this rider recites liability for damage directly due to some disasters, such as fire, which direct damage is covered by the clause in the policy hereinafter quoted upon which plaintiff relies, but the reference to damage which is occasioned or occurs "during or in consequence of delay resulting therefrom" as thus expressly provided for in the rider, is not referred to in any part of the policy in force at the time of the stranding. Therefore, to say that without this rider the policy nevertheless covers what this rider expressly covered, and for which coverage a higher premium was charged, is an argument which is not convincing. The language of the policy upon which the plaintiff relies is the following:

"Touching the adventure and *perils* which the said Universal Insurance Company is contended to bear, and take upon itself, in this voyage, *they are of the seas,* men-of-war, fires, enemies, pirates, rovers, assailing thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes, or people, of what nation, condition or quality, soever, barratry of the Master and Mariners, *and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof.* And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard

and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said Universal Insurance Company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance by the assured or his or their assigns, at and after the rate of as agreed." (Italics inserted.)

I do not think that, in the light of the authorities to which [fol. 25] I have referred, it is correct to say that "the perils" of the sea above referred to, cover or were intended to cover a situation such as is here presented, while I am satisfied that one of the very purposes of the rider was to include such a situation, because not otherwise included. In short, I do not think that the broad language of the initial paragraph of the main policy, which has just been referred to, is broad enough, standing by itself, to include liability on the part of the insurance company for delay due to stranding. Tempest and collision are just as much "a sea peril" as is stranding. None of these is specifically referred to in the clause of the policy just quoted. Indirect damage due to tempest and collision delay is not recoverable under such a clause. See Taylor vs. Dunbar, Pink vs. Fleming and Perry vs. Cobb, supra. Therefore, when, as here, "the sea peril", to wit, the stranding, was no more the proximate cause of the damage to the goods, but only the antecedent cause of the delay, there can be no recovery, at least according to the weight of English authority.

A word only is sufficient with respect to the other clause upon which defendant relies by its second special plea. I think that has no application whatsoever to the present case, because, as I interpret it, it relates only to situations where there has been some ingress of water into the vessel, and the damage referred to is clearly a water damage. That provision is as follows:

"It is warranted by the assured, free from damage or injury from dampness, change of flavor or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry

goods, cutlery or other hardware, and on shipments from ports and places East of the Cape of Good Hope, on gunny cloth, gunny bags or hides, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, so far as practicable."

I am, of course, aware of the fact that there is a rule of law that in construing policies of this kind they must be liberally interpreted in favor of the insured, that is, rather [fol. 26] strictly interpreted against the insurance company which drew them. I do not mean to say that I disagree with the Corsicana case, because, as just stated, I am not now called upon to apply it. The weight of authority as expressed by the cases cited, which would seem to be contrary, both in England and this country, to the Corsicana decision. But I make this statement merely by way of dictum, because I rest by decision squarely upon the state of facts here, which are different from those in any of the authorities to which I have been referred. In other words, it is not necessary for me to determine whether—were the cancelled rider not before me—by the weight of English or American authority, or both, the cause that is truly proximate, is the one not proximate in time, but proximate in efficiency; or whether, in any event, it must be shown, in order to render defendant liable, that the loss is proximately due to one of the known perils among which retardation or delay of the voyage should not be included.

Summing up my conclusion very briefly, it is this: Where an insurance policy contains broad language, thus affording ground for argument both ways that is that it may or it may not apply to a specific case if the parties are found to have previously covered that specific case by a separate clause, which, however, they later annulled, and for which one of the parties, the insured, had agreed to pay more, then that is very persuasive evidence, if not, indeed, entirely conclusive, that the parties did not intend that such specific case should thereafter be covered by the policy.

Lastly, I find no error in the manner in which the question of this rider was raised. The object of pleadings ought to be to get all questions before the court as promptly as possible, and leave no ground for temporizing pleas or delays at the trial. I find that the ambiguity surrounding

the language of the original policy permitted, in fact called for, a consideration of everything that had gone before. And to raise this rider by a special plea, as is done, I think is entirely consistent with our practice.

I will sign an order in conformity with this opinion overruling the demurrer, the practical effect of which will be to dispose of the entire case.

[fol. 27] IN UNITED STATES DISTRICT COURT

COLLOQUY IN OPEN COURT FOLLOWING DELIVERY OF OPINION BY THE COURT—Filed July 6, 1936

(After the delivery of the opinion, the following occurred).

Mr. Wortche: Is that to both pleas, your Honor?

The Court: Yes. It disposes of the case, does it not?

Mr. Forbes: That is what we want to be perfectly sure about, that there is nothing further for your Honor to conclude, so that in pressing the matter further we will have a complete record. I think you disposed of everything in your opinion.

The Court: That is my understanding. That is what I intended to do.

Mr. Forbes: And that is what I think has been done.

The Court: Is there any difference of opinion, as to that?

Mr. Ober: Technically, they could go ahead on the general issue plea and show there was no such policy, or dispute the facts.

The Court: That is just a duplication of effort.

Mr. Ober: That is all. As a practical matter, is disposes of it. Whether they appeal or whether they elect to try the issues, that won't help them any.

Mr. Forbes: Oh, no. My present attitude would be unquestionably to take an appeal and settle the matter. It seems to me it would be very idle to go into the trial of the case in view of your Honor's decision on this point. I think we would be wasting the Court's time and ours, too.

[fol. 28] The Court: My whole idea has been to settle the entire thing here.

Mr. Wortche: I assume, if we went to trial with the case and this rider was put in evidence, which your Honor un-

questionably would let in, you would grant a prayer taking the case from the jury, would you not?

The Court: Yes. You can have an opportunity to file a stipulation with any additional pleading which will put the matter in proper shape to take an appeal. That can be a matter of understanding between the parties. As far as the Court is concerned, I understand the matter is conclusive.

(Hearing closed.)

IN UNITED STATES DISTRICT COURT

At Law. No. 5801

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC.,

vs.

UNIVERSAL INSURANCE COMPANY

ORDER OVERRULING DEMURRER TO PLEAS AND DIRECTING ENTRY OF JUDGMENT IN FAVOR OF DEFENDANT—Filed July 25, 1936

The above entitled cause having come on for hearing on the plaintiff's demurrer to the defendant's third and fourth pleas, and the pleadings having been read and considered, and counsel having been heard, and the court having reached the conclusions set forth in an opinion filed herein, that the third plea of the defendant is conclusive of the issue and is an absolute defense to the suit and a replication would be unavailing and unnecessary, and counsel for the plaintiff having stated in open court that they did not desire leave to [fol. 29] reply to said pleas under said conditions it is this 25th day of July, 1936, by the United States District Court for the District of Maryland,

Ordered, Adjudged and Decreed—

1. That the said demurrer be and the same is hereby overruled.

2. That judgment be entered in favor of the defendant with costs.

William C. Coleman, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

DOCKET ENTRY

July 25, 1936. Judgment for the Defendant for costs.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed October 14, 1936

Now comes Lanasa Fruit Steamship and Importing Company, Inc., a body corporate, the plaintiff in the above entitled cause, and files the following assignments of error, upon which it will rely upon its prosecution of the appeal allowed in the above entitled cause, from the judgment of this court for the defendant for costs, on the 25th day of July, 1936.

1. The court erred in holding that the "first special plea" (third plea) of the defendant was good.

2. The court erred in not holding the third plea of the defendant sets forth no pleadable defense to the action of the plaintiff herein.

3. The court erred in not holding that the third plea of the defendant pleads as a defense a matter not part of the contract sued on, as appears on the face of the plea.

[fol. 30] 4. The court erred in holding that the rider set up in the defendant's third plea, which was not a part of the policy sued on, is the best and conclusive evidence of the interpretation which must be given to the other clauses of the policy, to wit: an interpretation in favor of the defendant.

5. The court erred in holding that "the perils" of the sea, as set out in the insurance policy sued on, do not cover, nor were they intended to cover, such a situation as is presented in the declaration in this case.

6. The court erred in holding that the broad language of the initial paragraph of the policy sued on was not broad enough, standing by itself, to include liability on the part of the defendant for delay due to stranding.

7. The court erred in not holding that the third and fourth pleas of the defendant did not violate the rules of good pleading, in that they amounted to the general issue plea, and were, therefore, bad.

8. The court erred in overruling the demurrer of the plaintiff to the defendant's third and fourth pleas.

9. The court erred in entering an order overruling the demurrer of the plaintiff to the defendant's third and fourth pleas.

10. The court erred in not entering an order sustaining the plaintiff's demurrer to the defendant's third and fourth pleas.

11. The court erred in entering a final judgment against the plaintiff on the pleadings.

12. The court erred in entering a judgment for the defendant for costs.

Wherefore, the said plaintiff aforesaid, prays that the said judgment of July 25th, 1936, may be reversed and set aside, and the case remanded to the District Court for further proceedings.

George Forbes, Henry L. Wortche, Attorneys for Plaintiff.

[fol. 31] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO MAKING UP TRANSCRIPT OF RECORD—
Filed October 14, 1936

It is stipulated and agreed by and between the counsel for the respective parties to this cause, as follows:

(a) That this cause was originally instituted in the Court of Common Pleas of Baltimore City, and by due procedure properly removed under the Acts of Congress to the District Court of the United States for the District of Maryland, on the ground of diversity of citizenship.

(b) That the transcript of record on plaintiff's appeal to the United States Circuit Court of Appeals for the Fourth Circuit, shall consist of the following:

1. Original Declaration,
2. Pleas of defendant to declaration,

3. Plaintiff's demurrer to defendant's third and fourth pleas,

4. Opinion of the Court overruling demurrer,

5. Proceedings in open court at the time of the rendering of the court's opinion on the demurrer,

6. Order of Court overruling demurrer and directing entry of judgment for defendant for costs,

7. Judgment,

8. Assignments of Error,

9. This Stipulation,

10. Docket Entries,

[fol. 32] 11. Memorandum of the Clerk,

12. Order to Transmit Record,

13. Clerk's Certificate.

It is further stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled cause, transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, and be printed in accordance with Rule 23 of that court.

George Forbes, Henry L. Wortche, Attorneys for Plaintiff. Ritchie, Janney, Ober & Williams, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

Dec. 7, 1935. Transcript of Record from the Court of Common Pleas of Baltimore City, filed.

Jany. 3, 1936. Pleas 1, 2, 3 & 4, Affidavit, Certificate of Counsel and Exhibit "A", filed (Service admitted). Rule Rep.

Jany. 7, 1936. Joinder of Issue on 1st and 2nd Pleas and demurrer to 3rd & 4th pleas, filed (Service admitted).

June 12, 1936. Order of Court overruling demurrer and directing clerk to enter judgment for the defendant for costs, filed.

June 12, 1936. Judgment for the defendant for costs.

July 25, 1936. Petition of Universal Insurance Company and Order of Court rescinding and striking out order of court entered herein June 12, 1936, filed.

[fol. 33] July 25, 1936. Order of Court overruling the demurrer herein and directing entry of judgment in favor of the defendant with costs, filed.

July 25, 1936. Judgment for the defendant with costs.

Oct. 14, 1936. Petition of plaintiff for allowance of an appeal to the U. S. Cir. Ct. of Appeals and Order of Court allowing the appeal as prayed, and fixing the penalty of the appeal bond at $300 filed.

Oct. 14, 1936. Assignment of Errors filed.

Oct. 14, 1936. Appeal bond approved and filed.

Oct. 14, 1936. Citation issued retble. within forty days. (Service acknowledged.)

Oct. 14, 1936. Stipulation of counsel as to making up transcript of record on appeal filed.

Oct. 29, 1936. Stipulation of counsel in re record on appeal, filed.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OF THE CLERK RE APPEAL PAPERS

(1) Petition for Appeal filed October 14th, 1936.

(2) Appeal Granted, October 14th, 1936.

(3) Appeal Bond, dated October 14th, 1936.

Obligors: Lanasa Fruit Steamship and Importing Company, Inc., as Principal, and the Fidelity and Deposit Company of Maryland, as Surety. Penalty $300.00. Conditioned for costs.

(4) Citation, dated October 14th, 1936. (Service acknowledged October 14th, 1936.

[fol. 34] IN UNITED STATES DISTRICT COURT

ORDER TO TRANSMIT RECORD

And thereupon, it is Ordered by the Court here, that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste:

Arthur L. Spamer, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4136

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., a Body Corporate, Appellant,

versus

UNIVERSAL INSURANCE COMPANY, a Body Corporate, Appellee

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

DOCKET ENTRIES

November 21, 1936. The transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under section 7 of Rule 14.

Same day, the appearance of George Forbes is entered for the appellant.

November 24, 1936. The appearance of Henry L. Wortche is entered for the appellant.

Same day, the appearance of Frank B. Ober and Southgate L. Morison is entered for the appellee.

December 9, 1936. Twenty-five copies of the printed record are filed.

[fol. 36] Argument of Cause

January 11, 1937. (January term, 1937) cause came on to be heard before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOURTH CIRCUIT

No. 4136

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., a Body Corporate, Appellant,

versus

UNIVERSAL INSURANCE COMPANY, a Body Corporate, Appellee

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

(Argued January 11, 1937. Decided April 6, 1937)

Before Parker, Northcott and Soper, Circuit Judges

George Forbes and Henry L. Wortche for Appellant, and Southgate L. Morison and Frank B. Ober (Bigham, Englar, Jones & Houston; Martin Detels, and Ritchie, Janney, Ober & Williams on brief) for Appellee.

OPINION—Filed April 6, 1937

[fol. 37] PARKER, Circuit Judge:

This is an appeal from a judgment for the defendant in an action on a policy of marine insurance. The declaration set forth the policy and alleged the loss of a cargo of bananas as covered thereby. Defendant filed four pleas, the first two pleading the general issue, and the others being special pleas which set up as precluding the right of recovery one of the clauses of the policy and the cancellation of a certain rider which had been attached thereto. Plaintiff demurred to the special pleas and upon the hearing of the demurrer conceded that its right to recover depended upon the court's construction of the policy. The court, after overruling the demurrer as to one of the pleas and sustaining it as to the other, entered judgment for the defendant on the pleadings; and the defendant has appealed from that judgment. The facts disclosed by the pleadings are as follows:

On June 23, 1933, the Universal Insurance Company issued to the Lanasa Fruit Steamship and Importing Com-

pany a floating policy of marine insurance, covering in the sum of $35,000.00 shipments of fruit from the West Indies to the United States. For this policy a premium of 25 cents on the $100.00 of risk was charged. The general coverage clause [1] embraced perils of the seas; but a subsequent clause limited liability with respect to fruits and "other articles that are perishable in their own nature" to cases involving total loss or general average.[2] [fol. 38] This was modified by rider containing provisions with respect to fruit which provided coverage for particular average, or partial loss, in case of stranding.[3]

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[1] Touching the adventures and perils which the said Universal Insurance Company is contented to bear, and take upon itself, in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, assailing thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes, or people, of what nation, condition or quality soever, barratry of the Master and Mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof.

[2] It is also agreed that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian Meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging and other articles used for bags and bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; * * *.

[3] Special conditions under deck: Warranted free from particular average unless the vessel or craft be stranded, sunk, burnt, but the assurers are to pay the insured value of any package or packages which may be totally lost in loading transshipment or discharge, also any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyances with any external substance (ice included) other than water, or to discharge of cargo at a

On April 4, 1934, for an additional premium of 35 cents, the company added a rider to the policy providing that it should be free of particular average unless the vessel were stranded, sunk, burned, on fire or in collision, in any of which events there should be liability "for such loss by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom".[4] On June 25, 1935 this rider was cancelled and the rate on the policy was reduced from 60 cents to 25 cents.

In July 1935 the Norwegian Steamship Smaragd, loaded with bananas belonging to plaintiff and covered by the policy sued on, was stranded while coming up Chesapeake Bay. Before she could be floated, the bananas became over- [fol. 39] ripe and rotted, resulting in a total loss of the cargo; and this action has been instituted to recover under the policy for the loss sustained. The only question in the case is whether this loss is covered by the policy. The contention of plaintiff is that it is covered since it resulted from stranding which, as a peril of the seas, is embraced in the coverage. The contention of the defendant is that it is not covered as it resulted, not from stranding, but from delay incident thereto and that the intention that loss resulting from such delay should not be covered is shown

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port of distress, also to pay landing, warehousing, forwarding and special charges, if incurred. * * * Shipments on deck to be insured: Free of particular average unless caused by the vessel being stranded, sunk, burnt, on fire, or in collision, but including jettison and/or washing overboard, irrespective of percentage.

[4] The whole of the clause is as follows: Free of particular average unless the vessel be stranded, sunk, burned, on fire or in collision, if any, all or several of which events the insurers are liable for such loss by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom. Insurers are liable also for such loss in consequence of delay resulting from any, all or several of the following causes; i. e. breakage of shaft, loss of blades from propeller, derangement or breakage of machinery, derangement or breakage of rudder and/or sternpost, whether or not the vessel be stranded, sunk, burned, or in collision, provided that in all cases the loss amounts to 10% after deducting 5% for ordinary loss.

by the act of the parties in affixing and subsequently cancelling the rider relating to loss from delay. The judge below based his decision for defendant upon the presumed intention of the parties as evidenced by their conduct in affixing and cancelling this rider.

There can be no doubt but that stranding is one of the marine perils covered by the policy. Richelieu etc. Nav. Co. v. Boston Marine Ins. Co. 136 U. S. 408, 421; Liverpool Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 438. And this is expressly recognized in the quoted warranties against particular average in which loss from stranding is excepted. The question, however, is not whether the policy covers loss and damage due to stranding, but whether it covers damage due to the decay of cargo where stranding did not cause the decay but merely the delay in voyage which was the occasion for the decay resulting from the inherent nature of the cargo. This question is to be answered, not in the light of the logic which courts might employ in dealing with such questions as liability of the vessel for negligence in stowage (cf. The Nichoyo Maru, this day decided — Fed. (2d) —), but in the [fol. 40] light of the construction which has been given to "an ancient form of words which have always been taken in a narrow sense." Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co. 263 U. S. 487, 493. And the answer is found by the courts in the application of two well settled rules, one that the underwriters take no risk with respect to the retardation of the voyage nor its interruption by the perils insured against (Jordan v. Warren Ins. Co. 1 Story 342, Fed. Cas. No. 7524, 38 C. J. 1097), and the other that the proximate and not the remote cause of the loss is to be considered, the latter rule being applied with greater strictness in the case of marine insurance than in other cases. Arnould on Marine Insurance and Average, 10th ed., vol. 2, sec. 818. The resulting rule is thus stated in 38 C. J. 1097:

"Insurer in general takes no risk with regard to the length or retardation of the voyage by the perils insured against, nor to its interruption, if it is resumed or capable of being resumed; as in the case of an embargo, or where the master is detained in port by a prosecution against him for a supposed violation of law, or where he remains to prosecute a suit for collision, or where a cargo insured is sunk and raised uninjured after considerable delay and is sold for a less price owing to the delay, or where a cargo of meat, fruit, or other

perishable goods is injured by the delay, or a collision causes delay for repairs."

The leading English case dealing with the question is Taylor v. Dunbar 4 L. R., decided in 1869, wherein it was held that there was no liability under a marine policy for damage to meat resulting from delay due to tempestuous weather. Keating, J. said: "The facts stated in the case show beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of the voyage. That delay was occasioned by tempestuous weather; but no case that I am aware of has held that a loss by the unexpected duration of the voyage, though that be caused by perils of [fol. 41] the sea, entitles the assured to recover on a policy like this". Montague Smith, J., said: "To render the underwriter liable, it must be shown that the loss is proximately due to one of the known perils. Retardation or delay of the voyage is not one of them". Brett, J., said: "Such damage must have occurred many times, and yet no trace is to be found of such a claim being maintained. If it be desired, a clause may easily be inserted in the policy to meet the case."

In another English case much cited, Pink v. Fleming 25 L. R. 396, decided by the Court of Queen's Bench in 1890, it was held that there was no liability under such a policy for damage to fruit from delay due to collision. Lord Esher, M. R., said: "It is well setfled that by the law of England there is a distinction in this respect between cases of marine insurance and those of other liabilities. In cases of marine insurance the liability of the underwriters depends upon the proximate cause of the loss. In the case of an action for damages on an ordinary contract, the defendant may be liable for damage, of which the breach is an efficient cause or causa causans; but in cases of marine insurance only the causa proxima can be regarded." Lord Justice Lindley said: "It has long been the settled rule of English law with regard to marine insurance that only the causa proxima or immediate cause of the loss must be regarded. The rule is well known, and people must be taken to have contracted on that footing." Lord Justice Bowen said: "Whether we consider the damage occasioned by the delay or that occasioned by the handling of the fruit, the same principle appears to apply. The proximate cause of the loss was not the collision or any peril of the sea. It was the perishable

character of the articles combined with the handling in the one case and the delay in the other." While Lord Esher used language in his opinion to the effect that the cause last in point of time should be regarded as proximate, which cannot be supported, there has been no question as to the cor-
[fol. 42] rectness of the rule laid down in the language quoted or of its application to cases of this character.

Other English authorities laying down the same rule are Imerson Steamship Co. v. Bischoff 7 L. R. 670, holding that loss of freight resulting from the exercise of a power of mulct or abatement because of delay caused by a peril of the sea, was not covered by the policy, and Totham v. Hodges 6 T. R. 656, holding that death of slaves for lack of provisions due to delay caused by bad weather was not covered. The rule was codified in the Marine Insurance Act of 1906, Sec. 55(2) (b), as follows:

"Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against."

In this country, Taylor v. Dunbar has been followed in Cory v. Boyleston Fire & Marine Ins. Co. 107 Mass. 140, 9 Am. Rep. 14, and in Perry v. Cobb 88 Me. 435, 49 L. R. A. 389. In the first of these cases, in which the opinion was written by Mr. Justice Gray, it was held that there could be no recovery for injury to goods by the ordinary dampness of the hold, though aggravated by the length of the voyage and the variety of the climate through which the vessel has passed in consequence of perils of the sea, "because such injury is still, if those perils do not otherwise operate upon the goods, attributable to the nature of the goods themselves, and not to the perils of the sea, as the proximate and efficient cause." In the second, it was held that there could be no recovery for that part of the damage to a cargo of lime which was attributable to prolongation of the voyage, although this was due to perils of the sea, the court saying: "The general rule is that everything which happens through the inherent vice of the thing, or by the act of the owners, master, or merchant shipper, shall not be reputed a peril, if not otherwise borne on the policy. * * * If the in-
[fol. 43] herent vice be stimulated by a protracted voyage, it is still no loss from a peril of the sea." The same hold-

ing as to decay of perishable goods being attributable to the vice of the goods and not to marine perils causing delay was made in general average cases by Mr. Justice Grier in Bond v. The Superb, 1 Wall. Jr. 355, 3 Fed. Cas. No. 1,624, and by Judge Woolsey in The Casey 39 Fed. (2d) 130 at 138. In the case last cited the learned Judge said: "It may be alleged, as it is in this libel, that the deterioration of the cargo was due to the delay at the port of refuge, but all men know that delay does not cause decay, although it may be the occasion owing to which decay occurs."

It must be conceded that number of American cases have not followed the English rule, a fact to which Lord Esher adverted in Pink v. Fleming, supra. Thus in Williams v. Smith 2 Caines Rep. 1 (N. Y.) it was held that there was liability for deterioration of cargo resulting from delay caused at a port of necessity into which the vessel had been driven and in which she was detained by blockade and pestilence. In Tudor v. New England Ins. Co. 12 Cush. 554, it was held that there was liability for a cargo of ice which was sold at a loss because a vessel was driven by perils of the sea into a port for repairs and the nature of the cargo, which would not permit of delay, made such action necessary. And in the Corsicana 203 N. Y. Supp. 10, aff. per curiam 239 N. Y. 573, 1924 Am. M. C. 365, the principal case upon which plaintiff relies, it was held that there was liability for loss sustained with respect to a cargo of potatoes which had begun to rot as a result of delay when the vessel in which they were being carried was driven into the port of Charleston for repairs. That case, however, while drawing distinctions which it is not necessary here to elaborate, approved the rule that "if the inherent vice of the article shipped is stimulated by a protracted voyage, it is still no loss from a peril of the sea". Magoun v. New England [fol. 44] Marine Ins. Co., 1 Story 157, 16 Fed. Cas. 483, another case upon which plaintiff relies, throws little light on the question before us, as the loss there involved arose out of a restraint by government and the question was as to whether there was a total loss. And Firemen's Fund Ins. Co. v. Frazier Powder Co. (C. C. A. 9th) 253 Fed. 305, involved not a loss due to delay, but liability for a "particular charge" incurred in forwarding cargo of a stranded vessel to its destination, the holding being that the stranding was the proximate cause of the incurring of this extra expense.

Counsel for plaintiff candidly admit that the English rule precludes liability in this case; and, the state of the authorities being what it is in this country and there being no contrary decision by the Supreme Court or any federal court, we feel that the English rule should be followed, as in cases of marine insurance it is highly desirable that our decisions be kept in harmony with those of England, "the great field of this business." Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co. 263 U. S. 487, 493; The Eliza Lines 199 U. S. 119, 128; Aetna Ins. Co. v. Houston Oil & Transport Co. (C. C. A. 5th) 49 Fed. (2d) 121, 124; New York & Oriental S. S. Co. v. Automobile Ins. Co. (C. C. A. 2d) 37 Fed. (2d) 461, 463. Plaintiff argues that the decisions of the New York courts should be followed in interpreting the contract because it was made in that state. Assuming the fact to be as stated, although this does not clearly appear from the record, the conclusion does not follow; for it is well settled that, in the interpretation of contracts of insurance the federal courts, in the absence of statute, follow the general law and are not bound by state decisions. Washburn & Moen Mfg. Co. v. Reliance Ins. Co. 179 U. S. 1; Aetna Life Ins. Co. v. Moore 231 U. S. 543, 559; New York Life Inc. Co. v. Yerys (C. C. A. 4th) 80 Fed. (2d) 264, 265; Walters v. Mutual Life Ins. Co. (C. C. A. 4th) 64 Fed. (2d) 148; Niagara Fire Ins. Co. v. Raleigh Hardware Co. (C. C. A. 4th) 62 Fed. (2d) 705; Fountain & Herrington [fol. 45] v. Mutual Life Ins. Co. (C. C. A. 4th) 55 Fed. (2d) 120, 124; Aetna Ins. Co. v. Houston Oil & Transport Co. (C. C. A. 5th) 49 Fed. (2d) 121, 124; Hawkeye Com. Men's Ass'n v. Christy (C. C. A. 8th) 204 Fed. 208, 211; Travelers Ins. Co. v. Thom (C. C. A. 1st) 180 Fed. 82; McKelvie v. Mutual Benefit Life Ins. Co. (C. C. A. 2d) 287 Fed. 660. In the case first cited, which involved a policy of marine insurance executed in Massachusetts, the Supreme Court, speaking through Chief Justice Fuller, said:

"It is said that a different rule has been laid down in Massachusetts by the Supreme Judicial Court of that commonwealth. Kettell v. Alliance Ins. Co., 10 Gray, 144; Mayo v. India Mut. Ins. Co., 152 Mass. 172. Even if this were absolutely so we should not feel constrained, though regretting the difference of opinion, to depart from our own rule. The policy was a Massachusetts contract, it is true, but its construction depended on questions of general com-

mercial law, in respect of which the courts of the United States are at liberty to exercise their own judgment and are not bound to accept the state decisions as in matters of purely local law."

The fact that the rider, subsequently cancelled, covering loss and damage from delay was affixed to the policy shows that the parties placed the same interpretation upon the general coverage clause of the policy which we have placed upon it, and that plaintiff was willing to pay an additional premium greater than the original premium for protection against such loss and damage. Plaintiff argues that the rider embraced causes for delay in addition to the marine perils against which the policy insured. This is true, but the fact that the rider covered also loss due to delay from those perils is strong proof that the parties did not interpret the policy without the rider as covering such loss. The argument, advanced at the hearing, that the rider was to cover partial loss is without point since under the policy without the rider plaintiff was insured against partial loss as well as against total loss caused by stranding, but, as we have [fol. 46] seen, not against loss from delay incident to stranding. If, therefore, we thought there were any doubt as to the interpretation to be placed upon the policy, we should think, as did the judge below, that the construction which the parties themselves placed upon it would determine the question involved against plaintiff's contention. Insurance Co. v. Dutcher 95 U. S. 269, 273; Williston on Contracts, Sec. 623.

We agree with the lower court that the clause* of the policy relied on by the fourth special plea has nothing to do with the case. Cory v. Boyleston Ins. Co., supra, 107 Mass. 140, 9 Am. Rep. 14, 19.

For the reasons stated, the judgment for defendant will be affirmed.

Affirmed.

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* That clause is as follows: "It is warranted by the assured, free from damage or injury from dampness, change of flavor or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils."

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4136

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., a Body Corporate, Appellant

vs.

UNIVERSAL INSURANCE COMPANY, a Body Corporate, Appellee

JUDGMENT—Filed and Entered April 6, 1937

[fol. 47] Appeal from the District Court of the United States for the District of Maryland

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Senior Circuit Judge.

April 6th, 1937.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 48] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 41,523. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 57. Lanasa Fruit Steamship and Importing Company, Inc., petitioner, vs. Universal Insurance Company. Petition for writ of certiorari and exhibit thereto. Filed May 12, 1937. Term No. 57, O. T., 1937.

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1936.

No. [redacted] 57

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., A BODY CORPORATE,

Petitioner,

versus

UNIVERSAL INSURANCE COMPANY, A BODY CORPORATE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE FORBES,
HENRY L. WORTCHE,
Counsel for Petitioner.

The Daily Record Co. Print, Baltimore.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. .....

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., A BODY CORPORATE,

Petitioner,

versus

UNIVERSAL INSURANCE COMPANY, A BODY CORPORATE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Lanasa Fruit Steamship and Importing Company, Inc., a body corporate, Petitioner, prays that a WRIT OF CERTIORARI issue to review the judgment and order of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above case on April 6th, 1937, affirming the judgment of the District Court of the United States for the District of Maryland.

SUMMARY OF THE MATTER INVOLVED.

The Petitioner filed its Declaration in the Court of Common Pleas of Baltimore City, on a marine policy of insurance covering a cargo of bananas, the declaration alleging that the plaintiff was the owner of a cargo of bananas shipped aboard the Norwegian steamship "Smaragd" in July, 1935, from Cuba to Baltimore, Maryland, on which the respondent had issued a policy of insurance to the Petitioner whereby the respondent promised to pay the petitioner on damage accruing to it by reason of destruction of or injury to the said cargo of bananas whether by perils of the sea or by fire or explosion or by stranding not in excess of $35,000.00.

That while said policy was in full force and effect, the "Smaragd" with a cargo of bananas aboard was proceeding up the Chesapeake Bay to Baltimore on July 21st, 1935, and went aground and stranded off Seven Foot Knoll and before she could be floated, the cargo of bananas became over-ripe and rotted, resulting in a total loss to the Petitioner in the sum of $20,229.00, which loss was due to a cause insured against under said policy; that the Petitioner furnished the requisite proof of loss, but the respondent refused and neglected to pay the same (R. 2-4).

There was attached to and made a part of the declaration the insurance policy (R. 5-16), the general clause of which, and on which Petitioner relied, providing as follows:

> "Touching the ADVENTURES AND PERILS which the said UNIVERSAL INSURANCE COMPANY is contented to bear, and take upon itself, in

this voyage, they are OF THE SEAS, men-of-war, fires, enemies, pirates, rovers, assailing thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes, or people, of what nation, condition or quality soever, barratry of the Master and Mariners, and all other perils; losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. * * * to the charges whereof, the said UNIVERSAL INSURANCE COMPANY will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance by the assured or his or their assigns, at and after the rate of AS AGREED." (R. 5-6).

To the declaration respondent filed four pleas, the first two being the general issue pleas and the third and fourth being special pleas (R. 17-18).

The third plea set up a *cancelled* rider on the policy as a defense, which rider was not only not in effect at the time of the loss and was not a part of the contract sued on, but as hereinafter shown in our brief, had absolutely nothing to do with a loss such as here sued on, which is for a *total* loss and not for a *partial* loss to which solely the rider applied. That plea (R. 17) was as follows:

"3. And for a third plea, that on or about April 4, 1934, in consideration of an increased premium, its policy of insurance referred to in the plaintiff's declaration was extended by indorsement at the request of the plaintiff to cover loss by decay, injury or damage to fruit in consequence of delay resulting from stranding. Said indorsement was in the form annexed hereto marked 'Exhibit A', and made a part hereof as fully as if set forth at length herein. And

that on or about January 16, 1935, and before the stranding alleged in the declaration, the coverage against damage in consequence of delay granted by said indorsement dated April 4, 1934, was cancelled by indorsement dated January 25, 1935, which provided—

'It is hereby understood and agreed that indorsement attached to this policy dated April 4, 1934, is cancelled in respect of shipments made on and after January 16, 1935, and *thereafter this policy covers the same as prior to the attachment of that indorsement,* and the rate is reduced from 60¢ to 25¢.' " (R. 17).

The pertinent part of the rider exhibit referred to and filed as a part of the pleas is as follows:

"April 4th, 1934.

"Endorsement to be attached to and made part of policy No. 12872 of the Universal Insurance Company of Newark, N. J., issued to Lanasa Fruit Importing Company, Inc.

"It is hereby understood and agreed that effective as to all shipments made on and after date this policy is amended to cover as follows:

"Free of PARTICULAR AVERAGE unless the vessel be stranded, sunk, burned, on fire or in collision, in any, all or several of which events the insurers are liable for *such loss* by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom. Insurers are liable also for *such loss* in consequence of delay resulting from any, all or several of the following causes; i. e. breakage of shaft, loss of blades from propeller, derangement or breakage of machinery, derangement or breakage of rudder and/or sternpost, whether or not the vessel be stranded, sunk, burned, or in collision, provided that

in all cases the loss amounts to 10% after deducting 5% for ordinary loss.

* * * * * *

"All other terms and conditions remaining unchanged." (R. 19-20).

The fourth plea set up a defense which is not necessary to here refer to as both the District Court and the Circuit Court of Appeals held, as Petitioner had contended, that the clause in the policy therein pleaded by Respondent had nothing to do with this case.

To these special pleas the Petitioner demurred for the reason that they set up no pleadable defense to the Declaration for the reasons therein set forth and joined issue on the general issue pleas (R. 20-1).

THE OPINION OF THE DISTRICT COURT.

The District Court held that this plea was an absolute defense to the Petitioner's Declaration, and finally disposed of the case by thus ruling on the pleadings, and it could, therefore, not be submitted to the jury, holding that the general clause heretofore quoted did not cover the loss of the cargo of bananas which was brought about by a delay due to the stranding of the vessel, basing his holding on the British decisions of *Taylor vs. Dunbar,* L. R. 4 C. P. 206, and *Pink vs. Fleming,* L. R. 25 2 B. D. 396, and discarding the rule that such loss was covered as laid down by the cases of *The Corsicana,* 203 N. Y. Sup. 10, affirmed *per curiam,* 239 N. Y. 573, 147 N. E. 201, *Tudor vs. New England Insurance Co.,* 12 Cush. (Mass.) 554, *Magoun vs. New England Marine Ins. Co.,* 1 Story 157, 16 Fed. Cas. 483; *Brown vs. St. Nicholas Ins. Co.,* 61 N. Y. 332, *Providence Wash. Ins. Co. vs. Adler,* 65 Md. 162, 4 Atl. 121, *Musgrave vs. Mannheim Ins. Co.,* 32 Nova Scotia Reports 405, *Rodocanachi vs. Elliott,* L. R. 9 C. P. 518.

THE DECISION OF THE CIRCUIT COURT OF APPEALS.

By opinion not yet reported, the Circuit Court of Appeals affirmed the decision of the District Court, adopting the British Rule and discarding the American Rule, stating at (R. 44):

> "and, the state of the authorities being what it is in this country and there being no contrary decision by the Supreme Court or any federal court, we feel that the English rule should be followed, as in cases of marine insurance it is highly desirable that our decisions be kept in harmony with those of England, 'the great field of this business.' * * * Plaintiff argues that the decisions of the New York courts should be followed in interpreting that contract because it was made in that state. Assuming the fact to be as stated, although this does not clearly appear from the record, the conclusion does not follow, for it is well settled that, in the interpretation of contracts of insurance the federal courts, in the absence of statute, follow the general law and are not bound by state decisions."

QUESTION INVOLVED.

The question involved is: Does the general clause of the marine cargo insurance policy, insuring for loss caused by perils of the sea, cover a loss where a marine peril, viz: stranding, has so delayed the voyage that the cargo has become a total loss?

REASONS FOR REVIEW.

We respectfully submit that this Honorable Court, in the exercise of its sound judicial discretion, will find grounds not only warranting, but making unquestionably advisable, a review of this case for—

1. The Circuit Court of Appeals (4th) has rendered a decision in direct conflict with the indicated viewpoint

of another Circuit Court of Appeals (9th) on the same matter, for while the vital issue in the instant case was not precisely there adjudicated, its decision clearly indicates that had this precise point been actually decided that it would have been contrary to the Fourth Circuit decision. (See Firemen's Fund Ins. Co. vs. Trojan Powder Company, 253 Fed. 305.)

2. If the contract in issue was a New York state contract as petitioner says it was (R. 10-11) but the Circuit Court of Appeals doubts (R. 44), an important question of local law has been decided by this Circuit Court of Appeals in a way not only "probably" in conflict with the applicable local decisions, but *actually* in conflict therewith.

But whether a *New York* State contract or not, it is equally true that an important question of law, be it local or general, has been decided by the Fourth Circuit in actual conflict with State decisions of most highly regarded State courts of last resort.

3. The Circuit Court of Appeals (4th) has decided an important question of "general law" in a way "probably untenable" and certainly in conflict with the weight of American authority which question has not been, but should be, settled by this court.

4. The British decisions and the American decisions are in conflict. The viewpoint of the Circuit Courts of Appeal are in conflict. The decision of the Circuit Court of Appeals for the Fourth Circuit is in direct conflict with most of the State decisions which State decisions, however, are in line with the viewpoint of the Ninth Federal Circuit, and this complicated situation should certainly be corrected.

It will be seen, therefore, that a confusing situation has resulted in which British law has been applied as controlling as against the law of the States of New York and Massachusetts, and that, in consequence, such a marine insurance contract again interpreted by these State courts would, of necessity, be contrary to the decision in this case. Furthermore, such a contract, in the Federal courts of these districts, might be otherwise interpreted, for the decision in the Fourth Circuit might not be followed, and the viewpoint of the Circuit Court of Appeals for the Ninth Circuit adopted. It is quite apparent from the Firemen's Fund case, *supra*, that when this issue is squarely presented to the Ninth Circuit its decision will be in conflict with this Fourth Circuit decision.

In American Courts the decision of the Circuit Court of Appeals for the Fourth Circuit is without support by Federal or State Courts. In the Ninth Circuit it is quite apparent it would not be approved, and in practically all of the State courts, of last resort, where the question has been submitted, the courts have decided in favor of the petitioner's contention here, and it is highly important, therefore, as the matter is one of great public interest, and the law of the land should be settled, that this court should review this case and decide the relative rights of parties under an important marine insurance contract of this kind—to say nothing of doing substantial justice in the instant case.

The aforegoing certainly presents a confused and complicated situation which should not be permitted to exist, and which only this court can rectify.

Wherefore, your Petitioner, referring to the attached brief in support of the aforegoing reasons for review, respectfully prays that this Honorable Court issue a *writ*

of certiorari, directing the Circuit Court of Appeals for the Fourth Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this court, as provided by law, and that the judgment of the Circuit Court of Appeals herein may be reversed, and that your Petitioner may have such other and further relief as to this Honorable Court may seem just.

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., A BODY CORPORATE,

Petitioner.

By ANTONIO LANASA,

President.

GEORGE FORBES,

HENRY L. WORTCHE,

Counsel for Petitioner.

(*Emphasis ours throughout.*)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The vital question presented by this record is:

Does the standard general clause of the marine cargo insurance policy here involved, insuring against losses caused by perils of the sea, cover loss of a cargo of bananas where the vessel was subjected to a marine peril, viz.: stranding, which resulted in frustration of the venture, the rotting of the bananas and their total loss?

The Circuit Court of Appeals decided that it did not, following the British Law as laid down in the cases of *Pink vs. Fleming, supra,* and *Taylor vs. Dunbar, supra,* and discarding the American Law as laid down in the cases of *The Corsicanna, supra; William vs. Smith,* 2 Caines, 1, 2 Am. Dec. 209; *Tudor vs. New England Ins. Co.,* 12 Cush. (Mass.) 554; *Musgrave vs. Mannheim Ins. Co.,* 32 Nova Scotia Repts. 405, with similar viewpoint indicated by the Ninth Circuit in *Firemen's Fund Ins. Co. vs. Trojan Powder Co., infra;* and the Court of Appeals of Maryland in *Providence Washington Ins. Co. vs. Adler, infra.*

The Corsicanna, supra, decided by the Court of Appeals of New York in 1925, and of which Court Mr. Justice CARDOZO was then a member, is the latest decision on the point and is a clean-cut holding in favor of the petitioner's contention here, and seems to us conclusive.

Both the American and British cases decide the question on the law of proximate cause, the American cases holding that the proximate cause was the marine peril,

it being the efficient cause; and not the cause last in point of time. They therefore hold that the stranding, the marine peril involved, and not the consequent delay or rotting of the cargo was the proximate cause, and that there would have been no loss except for the stranding. This is but adopting the old squib case doctrine. The British cases, however, hold that the final consequence was the proximate cause and not the marine peril.

We submit that the British rule is strained and unnatural, and that the American rule is the better one, in accord with the general law of our land, on proximate cause, and more in harmony with logic and substantial justice.

Applying the British rule would mean that no matter what sea peril occurred on a voyage if the cargo was not thrown into the sea or damaged by direct contact with sea water, but was caused to rot by the delay brought about by the sea peril the loss would not be covered by the policy. If a vessel went on the rocks in the open sea and could not be salvaged, but before she broke up from the action of the sea her cargo rotted, the policy here sued on would not cover such a loss. Clearly such situation is illogical and wholly untenable.

However, that is the effect of the decision of the Circuit Court of Appeals in this case, and to reach it the Court has rejected all the well-reasoned American Law on the subject, some cases being over a century old, and adopted the strained British Law which, incidentally, is very much weakened by a later decision of The House of Lords in *Leyland Shipping Co. vs. Norwich Union Fire Ins. Soc.* (1918) L. R. App. Cas. 350.

It may be well here to remark that neither *Pink vs. Fleming* nor *Taylor vs. Dunbar* reached The House of

Lords and to note that the compilers of the British Merchant Marine Act of 1906 with astute foresight evidently thought it prudent to embody the rule in that act as it did in Sub-division 2 (b) Sec. 55. In any event, the result was to harmonize the case and statute law. In America, on the other hand, it is equally significant that The American Merchant Marine Act of 1920 has in it no such provision and *it* is, therefore, in harmony with *American* decisions. It would seem, therefore, that each nation in the compiling of their respective acts has designedly had regard for the then state of the law in each nation. *The Corsicanna* case followed in 1925 and reaffirmed the existing law of this country.

As this British statute defines what the law of England is on the question, there is now no necessity *there* for deciding the issue on the question of proximate cause, and we submit in the absence of statute in this country the rule of proximate cause as laid down in *The Corsicanna, supra,* and other cases is much more logically reasoned and should here be followed.

If there could be any doubt that the policy in this case was to be construed according to the American decisions, it is dispelled by a typewritten clause on the policy in suit titled "Special Conditions under Deck" (R. p. 12), which provides *aliunde* that the insurers are obligated to pay "*any* loss of or damage to the interests insured which may reasonably be attributed to * * * collision or contact of the vessel * * * with *any* external substance (ice included) other than water * * *."

Certainly under the clause cited, the insurers have agreed to pay for *any* loss of or damage to the interests insured which may reasonably be attributed to "* * *

contact of the vessel with any external substance (ice included) other than water, * * *" which clearly indicates that if the loss here involved could *reasonably* be attributed to the stranding it was covered. Could more be said to show that the loss was "attributable" to stranding when it is clear *there would have been no loss if the stranding had not occurred?* This makes applicable American decisions as against British decisions as the American decisions are in line with that language, and the British decisions are not.

This court, therefore, should first have in mind that the insurance contract sued on was made in the State of New York (R. 5, 10, 11, 15), where the Appellate Division and the Court of Appeals in The Corsicanna case decided, without dissent by any one of the *twelve* judges who sat in these two courts, that the clause on which petitioner sued should be interpreted not by the British decisions, which they fully considered, but by American decisions: and this case has certainly been regarded as the law throughout the United States for over a decade. It would seem conclusive, in this case, as to a contract made in that state, which next to London is the originating source of more marine contracts than any city in the world and is probably a close second to London at that.

The practical situation is, therefore, that while four Federal judges, namely, PARKER, NORTHCOTT, SOPER and COLEMAN, have passed negatively on petitioner's contention, that *twelve* judges, one now a member of the Supreme Court, have passed affirmatively on it. These judges in the Appellate Division were KELLEY, P. J., RICH, KELLY, YOUNG and KUPPER, and in the Court of Appeals were HISCOCK, Ch. J., CARDOZO, POUND, McLAUGHLIN, CRANE, ANDREWS and LEHMAN. This affirma-

tive view, furthermore, has been followed by several other courts, and numerous judges, including Mr. Justice STORY, as hereinafter pointed out. The great weight, therefore, of American authority is distinctly with the petitioner in its contention.

We realize, of course, (R. 44-5), that Federal Courts need not recognize State Court decisions if they be otherwise minded, but we do say that in equity and good conscience that as each case is dependent upon its own state of facts that in the instant case the State decisions, and particularly the New York cases, should be given special weight, for it is clear that this contract made in New York City was made with special reference to the New York law as established by *The Corsicanna* case which it is inconceivable was not known to the insurers since *U. S. Lloyds* was there the party defendant. We say that the policy was a New York contract. The Circuit Court of Appeals, though "assuming the fact to be as stated," has some doubts apparently about it (R. 44), but the facts were these:

The Insurance Company, though a New Jersey corporation (R. 5), had as its General Manager Talbot Bird & Company, Inc., of 51 Beaver Street, *New York City* (R. 5. 10, 11, 15). The policy was signed by its president and secretary by facsimile *printed* signatures at its office in New Jersey but was made and accepted upon the express condition that it "shall not be *valid* unless countersigned by Talbot Bird & Company, Inc., General Managers of the Company", and it was so countersigned "at New York this 23rd day of June A. D. 1933" by "Universal Insurance Company, Talbot Bird & Company, Inc., General Managers, and James G. Manton, Attorney," (R. 10). It is a well-known practice of insur-

ance companies, whether marine or fire, to prepare blank policy forms with the signature of the company officials *printed* in but to provide that they only become valid *id est;* only became contracts, when signed by General Managers, Agents or by Attorneys as here. The policy, therefore, only became a contract between the parties when validated by the execution of said policy by the signature of its General Manager and Attorney at New York. In other words, it only *there* became an effective and valid contract. Prior to that it was without effect or binding power.

On this state of facts we submit the contract in question was clearly a New York State contract and the State court decisions should govern, but even if not held to be controlling, on the assumption that its construction depended on questions of general commercial law on which Federal courts are at liberty to exercise their own judgment, we find no Federal court decision supporting the opinion of the Circuit Court of Appeals for the Fourth Circuit, but that on the contrary the only Federal court opinion, (although not flatly deciding the point), indicating beyond question that had the precise point been before them, their decision would have been contrary to the Circuit Court of Appeals decision in the instant case. We refer to the unanimous decision of the Ninth Circuit in the case of Firemen's Fund Insurance Company, 253 Fed. 305.

Wholly aside, however, from the question of whether this contract is a New York State contract or not, since the company was a New Jersey corporation and the policy was validated in New York and delivered in Maryland, it was of necessity a contract wholly American in its every aspect and being such there can be no justifica-

tion for applying British statute or case law to its interpretation.

The Court will also have in mind the familiar rule, which does not need citation of authority, that in construing policies of this kind they must be *liberally* construed in favor of the insured, and *strictly* interpreted against the insurance company.

There can be no dispute, and we do not understand that there is, that stranding is a *peril of the sea.*

Richelieu, etc. vs. Boston Marine Ins. Co., 136 U. S. 408, 34 L. Ed. 396
American Hawaiian S. S. Co. vs. Bennett, 207 Fed. 510.

And this was so held by the Circuit Court of Appeals (R. 39).

That such a loss, as was here sustained, is clearly covered by the *general* clause of the policy, *supra,* would seem to be unquestioned by virtually all the authorities in this country.

Having in mind the Declaration in the case at bar, and that the loss was due to the stranding of the vessel, which occasioned a complete frustration of the venture, and the resulting delay causing the bananas to rot and their never reaching their destination, Respondent's contention is no defense, and it has been so held in the leading case in the United States on the point, in which case all prior law, both American and English, is fully considered and ably discussed.

The Corsicanna, 1924 A. M. C. 365; 203 N. Y. Supp. 10, affirmed *per curiam,* 239 N. Y. 573; 147 N. E. 201.

In that case a steamer carrying a shipment of potatoes from New York to Cuba struck a submerged object, and had to put into Charleston, S. C. While there the potatoes (*although not injured in the collision or touched by sea water*) had to be sold on account of sprouting and rot. If the vessel had not put into Charleston for repairs, due to striking the submerged object, there would have been no damage to the potatoes—an identical situation to the case at bar—except that our cargo rotted when the vessel was still aground, which makes our case the stronger!

The clause in that case (*the clause on which we have sued*) was identical with the clause in the case at bar.

The Appellate Division, at p. 11 of 203 N. Y. Supp., said:

> "The precise question presented by this submission relates to whether loss by natural deterioration, during *a delay* in the voyage caused by a sea peril, is a loss by sea perils, within the meaning and intent of the policy of insurance,"

which is *precisely* the question here.

The Court further said, at pp. 11-12:

> "*Plaintiffs contend that, where the predominant cause of the loss is a sea peril, the underwriters are liable, although a contributing cause may have been deterioration and delay.* They cite Williams v. Smith, 2 Caines, 1, 2 Am. Dec. 209; Tudor v. New England Mutual Marine Ins. Co., 12 Cush. (Mass.) 554; Musgrave v. Mannheim Insurance Co., 32 Nova Scotia, 405 (1899). *They urge that the cause which is truly proximate is not proximate in time, but proximate in efficiency.* Leyland Shipping Co. v. Norwich Union Fire Insurance Society, [1918] L. R. App. Cases, 350; The G. R. Booth, 171 U. S. 450, 459,

460, 19 Sup. Ct. 9, 43 L. Ed. 234. Defendant asserts, however, that in order to render it liable it must be shown that the loss is proximately due to one of the known perils, of which retardation or delay of the voyage is not one, and in support of its contention cites Taylor v. Dunbar, L. R. 4 C. P. 206; Pink v. Fleming, L. R. 25 Q. B. D. 396; The Alps, [1893] L. R. Probate Div. 109-116; Reischer v. Borwick, [1894] L. R. 2 Q. B. 548; Inman Steamship Co. v. Bischoff, L. R. 7 A. C. 670-676; Perry v. Cobb, 88 Me. 435, 438, 34 Atl. 278, 49 L. R. A. 389; Firemen's Fund Ins. Co. v. Trojan Powder Co., 253 Fed. 305-311, 16 C. C. A. 87; Cory v. Boylston Insurance Co., 107 Mass. 140, 144, Am. Rep. 14; Moses v. Sun Mutual Insurance Co., 1 Duer, 159."

"The question presented has not been considered in any of the courts of this state since 1804. Williams v. Smith, supra. In that case, in which Hamilton and Riggs appeared as counsel, Judge Kent, writing for the court, held that, if a vessel be driven into a port of necessity and a pestilential disorder break out, which renders it impossible for her to pursue her voyage, it is a loss within the perils of the policy. The court said:

"' 'We are satisfied that the damage resulting from the pestilence at Cadiz is covered by the policy. It is not requisite to decide absolutely whether a pestilence is a peril direct within the policy. *It formed, however, a sound excuse for delay at Cadiz, and if the consequence of that delay was a deterioration of the subject insured, the insurer must be answerable for the loss.*' "

In *Williams v. Smith,* 2 Caines' Reports 1, the action was to recover on a policy covering the cargo of the ship Prosper, on a voyage from New York to Algiers. The cargo consisted principally of naval stores, including tar in barrels.

After leaving New York, the vessel met with heavy weather, began to leak and was compelled to put into Cadiz as a port of distress. At Cadiz a large part of her cargo was discharged and repairs were made. While the vessel was at Cadiz, fever broke out in the port, which so interrupted all business as to make it impossible for the master promptly to reload that part of the cargo which had been discharged. In the meantime the vessel was driven to sea by a gale, and, on her regaining Cadiz, a survey was held on the cargo. The surveyors reported that the cargo "both on shore and on board, from the heat of the climate and violence of the gale was deteriorated more than one-half of its original value." The cargo owner accordingly gave notice of abandonment to his underwriters.

At the trial of the action the court charged the jury—

> "That any damages which arose in consequence of the fever at Cadiz, were *within* the perils of the policy."

This charge was excepted to, and, on motion for a new trial, counsel for the underwriters argued that—

> "The loss was from a peril not within the policy. It was the consequence of *a delay* arising from a pestilential fever; and though the instrument, after enumerating the particular risks insured against, adds, 'all other perils,' &c., still, according to the known rule of law, they refer to those only of the same kind."

The Court, however, disagreed and held as above quoted.

The only answer of the Respondent to this argument is that the *English* cases of *Taylor vs. Dunbar,* L. R. 4 C. P.

206, and *Pink vs. Fleming,* L. R. 25 Q. B. D. 396, held, that delay was not covered under the general clause of a policy under the "perils of the sea" provision, basing their holding on the question of proximate cause as *that* Court construed proximate cause. If this was the law of this country the Petitioner here could not recover, but as argued and as fully set out in *The Corsicanna, supra,* this is *not* the law in the United States, either Federal or State.

That the British Rule is wholly at variance with the American Rule is clearly shown by what Lord ESHER said in *Pink vs. Fleming,* as quoted by the Appellate Division in *The Corsicanna,* at p. 13 of 203 N. Y. Supp., viz:

> "According to the English law of marine insurance only the last cause is to be regarded. • • • *with regard to the American authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them.*"

But in *The Corsicanna* the Court suggests that the grounds of the English decision are in apparent conflict with a later pronouncement of The House of Lords in the case of *Leyland Shipping Co. vs. Norwich Union Fire Ins. Society,* (1918) L. R. App. Cas. 350, saying at p. 13:

> "The ground of this decision that only the last cause can be regarded is *patently in conflict* with a later pronouncement of the House of Lords in the Leyland Case, supra, cited by the plaintiffs, in which a ship, having been torpedoed, proceeded to Havre, where she was anchored at a quay. Because of a storm the following day, she was anchored in the harbor, but at the fall of the tide she grounded, and because of the strain on her hull sank. The question presented for decision was whether the loss was due

to sea or war perils, which were excepted by the policy, and in holding that the proximate cause of the loss was the *torpedo attack,* Lord Shaw said:

> *'To treat proxima causa as the cause which is nearest in time is out of the question. * * * The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved, although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.'"*

And then after referring to a number of other cases sustaining the contention of the Petitioner here, the Court at p. 14 says:

> "Williams vs. Smith, supra, is another illustration of the doctrine enunciated by this case, which lays down a rule entirely different than that in the class of cases exemplified by Taylor vs. Dunbar, supra."

The Court then holds that the contention made by the Respondent here is *not* sound.

We feel that this is conclusive of Petitioner's argument on this point, but other decisions referred to in the opinion in *The Corsicanna* case, and other cases, clearly show the logic and correctness of that holding and that the decision of the Circuit Court of Appeals in this case is not only erroneous, but does not do substantial justice.

In *Tudor vs. New England Insurance Company,* 12 Cush. (Mass.) 554, the decision of the court is stated in the headnote as follows:

> *"If an article insured as free from average be placed in such a condition by the perils of the sea,*

that in consequence of inevitable deterioration or decay, it cannot reach the port of delivery, but will necessarily be destroyed before its arrival, and the same be sold at an intermediate port, this will constitute a total loss within the true intent of the policy."

The facts were that a cargo of ice had been insured against marine perils on a voyage from Boston to Calcutta.

Shortly after sailing the vessel sprang a leak and it became necessary for her to put into Bahia, Brazil, as a port of refuge. At Bahia the ice was discharged and it was found that a small portion had been melted by sea water. After the discharge, the whole cargo was sold at Bahia for the reason that if it had been sent forward to Calcutta, the port of destination, it would have become a total loss.

The court held that, under these circumstances, the ice had become a total loss and that the underwriters were liable, saying:

"The rule of law is now well settled that, under an insurance upon an article free from average, *if by reason of the perils insured against, it is placed in such a condition, that in consequence of inevitable deterioration or decay,* it cannot be carried to the port of destination, but will necessarily, before the completion of the voyage, be wholly destroyed, and it is accordingly sold, at an intermediate port, this will constitute a total loss within the true intent and meaning of the memorandum clause. * * * If, therefore, by reason of the perils insured against, it is rendered certain in the course of the voyage, that the article insured will inevitably perish or waste away, or that on arrival, it will cease to exist, it is a

> total loss under the memorandum clause; and a sale of the article, at an intermediate port, in which the vessel is by reason of distress, will be justified, and the proceeds will become a salvage for the benefit of the party who is to bear the loss. In such case it is clear that the loss is total, because, if the voyage had been pursued and completed, the articles insured would have ceased to exist, and thus been totally lost, within the meaning of the policy, at the port of destination. The sale, therefore, at the intermediate port, does not at all change the rights of the parties under the policy, but saves something for the benefit of the insurers, which would otherwise be wholly lost." • • • (12 Cush. 556).

In *Musgrave vs. Mannheim Insurance Co.*, 32 Nova Scotia Reports 405 (1889), the plaintiffs had insured with the defendants the freight, amounting to $4,773, of the Steamship Tyrian, on a voyage from Halifax to Havana.

Shortly after leaving Halifax, the Tyrian met with a heavy gale, which caused a breakdown of her machinery. After drifting about for some days, she was picked up by another steamer and towed to Bermuda.

In order to repair the Tyrian, it was necessary to discharge a large part of the cargo, which consisted of 7,000 barrels of potatoes and 285 drums of dried fish. It was found that the cargo *had not received damage from contact with the sea, but showed symptoms of decay.*

The cargo owners refused to allow the potatoes and fish to remain at Bermuda until repairs could be effected on the ground that the cargo could not bear the delay. At their request the cargo was redelivered to them and taken back to Halifax.

At the trial of the case the jury found that if the cargo had been sent forward on the Tyrian to Havana after the repairs had been effected, it would have become substantially a total loss.

The question before the Court was whether the freight had been lost by perils of the seas, counsel for the insurance company arguing that the proximate cause of the loss was *delay*, and the perishable nature of the cargo, and that consequently the underwriters were not liable.

The Court held that *the loss was due to perils of the sea* and that the underwriters were liable.

In an elaborate opinion Graham, J., likens the case to a suit brought to recover for a loss of perishable merchandise under similar circumstances, saying:

> "The analagous cases in which the insurance was on cargo, and cargoes were held to have been lost through a destruction of the adventure, *are very strong to show that delay and the perishable nature of the cargo do not intervene, as a more immediate cause between the accident to the ship and the loss of the cargo.* Indeed, as I understand the authorities, *they constituted the turning point of the case against the underwriter.* The loss of the subject by the loss of the venture is an old doctrine of insurance law going back to the time of Lord Mansfield, who applied it very liberally, and Lord Ellenborough, who restricted it, and, except as to the doctrine of ships being lost through a loss of the voyage, which has become obsolete, is still in force. The views of these great men are referred to by Story, J., in Peele v. Merchants' Ins. Co., 3 Mason, 68, who evidently sided with Lord Mansfield." (32 Nova Scotia Rep. 430.)

Further on Graham, J., quotes from the opinion of Lord Bramwell, in *Rodocanachi vs. Elliott,* L. R. 9 C. P. 523, as follows:

> "It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, to a destruction of the contemplated adventure." (32 Nova Scotia Rep. 430-1.)

Continuing, Graham, J., refers to Marshall on Insurance (Edition of 1823), 596:

> " 'When the insurance is on goods, the loss of the voyage for a season or any other term will operate as a total loss or otherwise, according to the nature of the goods.
>
> • • • • • •
>
> *But if the goods be of a perishable nature, so that the retardation of the voyage would operate as a destruction of them, the insured may abandon and claim for a total loss.'*
>
> "Two cases there cited for the text were afterwards used by Lord Abinger in Roux v. Salvador, 3 Bing N. C., 266. He said:
>
> 'Accordingly in the case of Hunt et al. v. The Royal Exchange Assurance Co., 5 M. & S. 47, which was cited by the Attorney General in support of his argument, the judgment of Lord Ellenborough contains a very important passage which distinguishes it from the present case. He says: "If, indeed, the cargo had been of a perishable nature, this would not have been a case of retardation only, but of destruction of the thing assured." And further he says: "I cannot necessarily infer that the flour would be changed in quality and condition by the delay from November to April so as to incur any material damage operating a destruction of the thing in-

sured. In the case of Anderson v. Wallis, which was also relied upon, the goods consisted of copper, which was wholly uninjured, and of iron which was partially damaged. But it is clear from the judgment of the court, that if, by reason of the perils of the sea, the goods could never have been sent to their destination, the loss would have been held to be total.'

"In Hunt v. Royal Exchange Assurance Co., 5 M. & S. 47, the flour, which formed the subject of insurance, was intact so far as sea damage was concerned." (32 Nova Scotia Rep. 431-2.)

And after discussing *Hunt vs. Royal Exchange Assurance Co.*, Graham, J., adds:

"In Goss v. Withers, 2 Burr, 683, there was a capture of a ship and cargo, both insured. The vessel remained in the enemy's hands eight days, was retaken and brought into Milford Haven, and, of course, there was a claim for salvage. Part of the cargo of fish, on its way from Newfoundland to Portugal, had been taken out of her and the remainder became spoiled at Milford Haven before the vessel could be refitted. Lord Mansfield held that there was a total loss of the ship. But that is not material and was questioned by Lord Ellenborough. He adds:

'Every argument holds stronger in the case of the other policy with regard to the goods. The cargo was, in its nature perishable, destined from Newfoundland to Spain or Portugal, and the voyage was as absolutely defeated as if the ship had been wrecked and a third or fourth of the goods saved.'

"Lord Abinger speaks of that as a leading case, and Story, J., approved of it." (32 Nova Scotia Rep. 433-4.)

And after mentioning a long line of decisions, the final conclusion of Mr. Justice Graham is that:

> *"Sea perils to the cargo comprise not only the sea breaking into the ship and cargo, but also marine accidents to the hull of the ship, placing the cargo where it cannot reach its destination. In many of the cases cited, there was no contact of the sea with the cargo."* (32 Nova Scotia Rep. 440.)

The decision of Mr. Justice STORY in *Magoun vs. New England Marine Insurance Company,* 1 Story, 157, 16 Fed. Cas. 483, fully covers the present case. There the suit was brought on a policy insuring the Schooner Yankee and her freight at and from St. Thomas to Rio de la Hache, and at and from there to New York.

It appeared from the facts, which were stipulated, that the schooner, after taking on board some hides and logwood at Rio de la Hache was seized by the local authorities. The asserted ground of the seizure was the carrying on of illicit trade by the master. Court proceedings to condemn the vessel were taken, which, some four months after seizure, terminated in a dismissal and the vessel's release. When the vessel was restored "it was found from her long exposure to the weather in a hot climate, in an open roadstead, that her hull and sails and rigging were so much injured" that she could not be repaired for less than her value, and "that the hides belonging to the cargo had become rotten, and were thrown overboard."

The argument made for the defendant insurance company was that the proximate cause of the loss was not the seizure, which was a "restraint of princes" covered in the policy, but "long delay and exposure to the cli-

mate." In disposing of this argument Mr. Justice STORY, at that time sitting on Circuit in Massachusetts, said:

> "The argument is, that the injury to the vessel, by the long delay and exposure to the climate, was the immediate cause of the loss, and the seizure and detainment the remote cause only; and that, therefore, the rule applies, 'Causa proxima, non remota, spectatur,' and the underwriters are not liable for injury by mere wear and tear, or by *delays* in the voyage, or by worms, or by exposure to the climate. *But it appears to me, that this is not a correct exposition of the rule. All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself.* If there be a capture, and before the vessel is delivered from that peril, she is afterwards lost by fire, or accident or negligence of the captors, I take it to be clear, that the whole loss is properly attributable to the capture. *It would be an over-refinement and metaphysical subtlety to hold otherwise; and would shake the confidence of the commercial world in the supposed indemnity held out by policies against the common perils.* The decision of the Supreme Court of the United States in Peters v. Warren Ins. Co., (at the last term), 14 Pet. (39 U. S.) 99, is directly in point; and in my judgment fully settles, that the restraint and detainment under the seizure are to be treated as the proximate cause of the loss in the sense of the rule. *The vessel was never delivered from that peril, until she was virtually destroyed and incapable to perform the voyage.*" (16 Fed. Cas. 485, 486.)

We do not see how this decision can be distinguished on any rational ground from the case at bar. Both the argument of counsel (16 Fed. Cas. at p. 485), and the opinion, show that *precisely the same point was decided,* and although the Circuit Court of Appeals in its opinion attempts to do so it is clear from their reference to it that

they do *not* do so, and dispose of it by merely stating it "throw very little light on this controversy" (R. 43-4).

In *Rodocanachi v. Elliott,* L. R. 9 C. P. 518 (Exchequer Chamber), silk had been insured while in transit from Shanghai to London. In the course of the voyage the goods were landed at Marseilles and sent forward by railroad to Paris, where they arrived on September 13, 1870. Before there was time for them to leave Paris the German armies had cut off all egress. On October 7th the assured abandoned the goods to underwriters, claiming a loss by "restraint of princes," one of the perils insured against. Prior to the trial the goods arrived in safety. In holding that the assured were entitled to recover, Baron Bramwell, who delivered the opinion of the court, said:

> "We cannot help thinking that the doubt arises through the speedy arrival of these goods uninjured. *Had they been perishable goods destroyed by the delay, it would be difficult to say that their loss was not caused by the restraint of princes.*" (L. R. 9 C. P. 523, 524.)

It would be difficult to frame a more explicit statement that underwriters are not released from liability because the physical damage suffered by the goods was due to delay, when that delay was caused by a peril insured against.

The hypothetical case put by Baron Pollock (in Naylor v. Palmer, 8 Exchequer 740, 751), is also illuminating. He there likened the case then before him to one

> "as if slaves, who had been conveyed in a vessel that was *driven on shore* by perils of the seas, and by reason thereof escaped; the perils of the sea would be the cause of a total loss of the subject insured."

In Baron Pollock's case Respondent would argue that the loss was due to the inherent characteristics of the subject matter insured, but, since the *opportunity* to escape was created by a peril insured against, Baron Pollock held that the loss was attributable to the antecedent peril.

The natural instinct of the negroes to give leg-bail to their captors is not properly distinguishable from the propensity of the petitioner's bananas to deteriorate and decay when delayed by the stranding of the vessel.

In the case of *Brown vs. St. Nicholas Ins. Co.*, 61 N. Y. 332, suit was brought on a marine insurance policy for the loss of a cargo of hay on a barge, which policy contained a clause known as the ice clause, viz.:

> "It is understood and agreed that if any boats, the cargo of which are covered by this policy, are prevented or detained by ice or the closing of navigation from terminating the trip, then in such case the policy shall cease to attach upon said cargo, and this company shall return the premium for the unexpired portion of said trip."

The canal boat, while proceeding down the Chesapeake and Delaware Canal, was blown *ashore* by a gale and separated from the steamtugs towing her and other barges. When the barge went ashore there was some ice in the river, but not enough to interfere with navigation. During the night the ice formed around the barge to such an extent the tugs could not reach her the next morning, though an effort to do so was made. The vessel remained in the ice until a thaw about fifteen days later, but when she thawed out she broke in two and was sunk, and the cargo became a total loss.

The defendant contended that it was relieved under the ice clause of the policy, as the loss of the cargo was the detention by ice. At p. 337, the court said:

> "A heavy gale drove the boat on which the cargo in question was carried on to the shore so that she was *stranded.* The detention caused by her being driven out of her course was due beyond all question to the gale. *Her detention on the shore until the ice formed around her was due to a consequence of the gale, stranding.*"

And the court held that the stranding was the *proximate* cause of the loss, and that, therefore, the plaintiff was entitled to recover under the policy.

In the case of *Providence Washington Insurance Co. vs. Adler,* 65 Md. 162, 4 Atl. 121, the plaintiffs shipped a quantity of oil clothing from New York to the South. It was packed in boxes and on arrival at destination it was found to be injured and practically worthless, either by spontaneous combustion or some chemical action arising in the goods itself. The court properly held that this was not a marine peril, but said:

> "*There is no doubt of the liability of the defendant company, under its policy, had the ship taken fire, and the goods have been consumed, or had the fire originated from any of the perils insured against;* but the question is a very different one when, as in this case, the goods are in good faith insured, and believed both by plaintiffs and defendant not to be liable to spontaneous combustion by reason of their inherent infirmity, but which in fact were so liable, and were so injured."

And the court then quotes from Parsons on Contracts (Vol. 2, p. 374, Sec. 6), as follows:

> "It is another rule that insurers are not liable for property destroyed by the effect of its own inherent

> deficiencies or tendencies, *unless these tendencies are made active and destructive by a peril insured against. Thus, if hemp which was dry when laden be afterwards wet by a peril of the sea, and by reason of such wet ferments or rots or burns, the insurers would be liable.*"

The court also quoted from Parsons on The Law of Marine Insurance (Vol. 21, p. 216), as follows:

> "It is also a rule that the insurers are liable for no subject-matter of insurance which is destroyed by reason of its own inherent defects or tendencies. *But this rule does not apply to tendencies which are called into activity only by a peril insured against.*"

The court further said:

> "In this case it is very clear that the goods were injured by their own inherent infirmity, and that such inherent infirmity was *not* called into activity by any peril insured against."

It is clear that the court would have otherwise decided had the fire in the goods been brought into activity by one of the perils insured against.

The stranding in the case at bar frustrated the venture occasioning a delay which caused the bananas to rot and necessitated their dumping before destination reached, and as stranding is a peril of the sea it was one of the perils insured against and the insurer is clearly liable.

In the case of *Firemen's Fund Ins. Co. vs. Trojan Powder Co.*, 253 Fed. 305, (C. C. A. 9th Ct.), the policy insured a cargo of explosives on the Steamship Pleiades from San Francisco to Balboa, which vessel *was stranded* off the coast of Mexico, and when the ship was subsequently

floated, because of her damaged condition she was unable to proceed on her voyage and was taken back to San Francisco, where the cargo was discharged into lighters. The explosives had been sold to the Panana Canal Commission with the right on the part of the commission to refuse to receive the ship if it did not arrive at a fixed time, she stranded, and there being no other market the plaintiff shipped them on another steamer and had to pay additional freight, which it was allowed to recover from the insurer as a particular charge under the British Insurance Law. In that case the point was also raised that the stranding was not the proximate cause of the extra expense to which the plaintiff was put, but the court, at p. 311, said:

> "Nor are we able to sustain the contention of the plaintiff in error that the *stranding* of the Pleiades was not the proximate cause of the extra expense to which the insured was necessarily put. *It was, as we view it, the sole cause.*"

The Circuit Court of Appeals dismisses this case (R. 44) with but cursory comment, but perusal will indicate it is much in point as indicating by the Ninth Circuit a viewpoint wholly at variance with the decision here.

In a recent work entitled "Inland Marine Insurance," by Earl Appleman, Esq., of the New York Bar, published in 1934, at pp. 42-43, the author succinctly states the governing law. He there says:

> "The question frequently arises as to whether natural deterioration of perishable cargoes caused by delay due to heavy weather or a peril insured against is covered by the term perils of the seas. It seems to be well settled that damage due merely to delay caused by heavy weather is not covered. The courts take the position that heavy weather is to be expected

and that prolongation of the voyage thereby is not a sea peril. *However, if the delay to which the deterioration is due be caused by a sea peril, the loss has been held to be covered.*"

"In Brandyce v. U. S. Lloyds, Inc. [The Corsicanna case], a vessel carrying a cargo of potatoes from New York to Cuba was damaged by collision with some unknown object and had to put in to Charleston for repairs. It became necessary to discharge the cargo; and as the delay caused the potatoes to rot and sprout, they were sold at a loss. The court held that the proximate cause of the loss was collision, a peril insured against, and hence that the underwriters were liable. In Tudor v. New England Mutual Marine Insurance Co., a ship carrying a cargo of ice sprang a leak and had to put in to a port of refuge. The ice, found to be melting due to contact with sea water, was sold at a loss, and it was held that the loss was caused by a peril of the sea."

And on note 1, p. 43, the author has this to say:

"In Pink v. Fleming, L. R. 25 Q. B. D. 396 (1890), a contrary result was reached, *but the court admitted that the American decisions were not in accord with the Enlish decisions on this point.* As was pointed out in the Brandyce case later decisions of the English courts have cast doubt on the authority of Pink v. Fleming."

And in *Winter on Marine Insurance*, 2nd Ed. (1929), p. 97, it is said

"A recent decision in New York, while confirming this general rule, held that where the delay resulted from a marine peril and, as a consequence of such delay, deterioration commenced, the underwriter was liable for the resultant loss, the proximate cause of the loss being the marine peril and *not* the delay."

And there is not a single American authority cited by these authors, cited elsewhere, or cited below in the instant case, conflicting with the argument here advanced.

The Circuit Court of Appeals (R. 40), concedes that in dealing with a question of this kind "the proximate and not the remote cause of the loss is to be considered * * *", but states that this rule is "applied with greater strictness in the case of marine insurance than in other cases," and cites Arnould on Marine Insurance and Average, a British publication, in support of that statement. That, however, is not in accord with the American law for the American cases all hold that the rule should be applied with greater liberalty in construing marine insurance contracts than in other cases

(*The Northwestern-Clinchfield Fuel Co. vs. Aetna Ins. Co.*, 1923 A. M. C. 1.)

where the American cases are fully discussed. Furthermore, the Circuit Court of Appeals does not even suggest that the stranding in this case, was not the cause of the loss of petitioner's bananas, but contents itself by relying solely on the authority of the British cases.

To support its decision in this case it also relies on a decision of the U. S. District Court (S. D. N. Y.), *The Casey*, 39 Fed. (2nd) 136, which was a *general average case* and in which case in speaking of *The Corsicanna*, Judge Woolsey said:

> "In Brandyce v. United States Lloyds, Inc., 207 App. Div. 665, 203 N. Y. S. 10, *the question involved was merely that of proximate cause in an action on an insurance policy.*"

This indicates that Judge Woolsey was clearly of the opinion that the question of proximate cause, which is the paramount and sole question here, was there properly decided as the accepted American law.

The Circuit Court of Appeals also suggests that the case of *Cory vs. Boyleston Fire & Marine Ins. Co.*, 107 Mass. 140, 9 Am. Rep. 14, which was decided by the same Court that decided *Tudor vs. New England Ins. Co., supra,* supports the English decisions (R. 7.), as also the case of *Perry vs. Cobb,* 88 Me. 435, but we respectfully submit these decisions clearly do *not* support the proposition.

In those cases *sailing vessels* were delayed by bad weather, and, on arrival at the respective ports of destination, it was found that the cargoes had deteriorated which damage the insured claimed was due to the delay.

The decisions in these cases are by no means inconsistent with the position of the Petitioner. It is a well-known fact that nothing is more uncertain than the time which will be employed by a sailing vessel in completing her voyage. Headwinds and calms will cause delay, and storms may lead to an alteration of the vessel's course. A voyage between distant points may require different periods of time according to the weather encountered. Now it is a well settled principle that marine insurance covers only "extraordinary and unforeseen perils" and not the ordinary vicissitudes of the voyage.

Hazard v. New Eng. Ins. Co., 8 Peters, 557, at p. 585;
Barnewall v. Church, 1 Caines, 217, at p. 234.

The mere fact, therefore, that a sailing vessel is delayed by headwinds, calms or even by storms is not a "peril of the sea,"—such delay is merely an ordinary incident of a voyage *in a sailing ship*. Even if it were made to appear that a part of the delay was occasioned by weather that was extraordinary, such as a tempest, it would be impossible to discriminate between the different causes of damage and apportion part to delay due to sea perils and part to the vicissitudes of the voyage. The impossibility of apportionment is the very ground on which the case of *Martin v. Salem Ins. Co.*, 2 Mass. 420, at 429, is decided.

It is a matter worthy of note that despite manifest energetic endeavors by counsel for the Respondent, *they have been unable to find a single American case where, on similar facts, the decision was in favor of the insurance company.* On the other hand, in *Tudor v. New England Ins. Co.* (12 Cush. 554), where the facts were precisely the same, the decision was in favor of the assured which is fully covered *supra*. In the *Tudor* case ice was shipped from Boston to Calcutta on May 1, 1850. On May 23rd the vessel sprang a leak. A few weeks later it was decided to put into port and on June 30th the vessel arrived at Bahia, a Brazilian port just south of the Equator. In order to repair the vessel it was necessary to discharge the ice, which made an immediate sale imperative. A small portion of the ice had been melted by contact with sea water, but this, of course, would have entitled the assured to recover only a comparatively small sum, whereas the Court held that the loss was total.

This brings us to the case of *Cory v. Boylston Ins. Co.*, 107 Mass. 140, suggested as authority in support of the decision in the case at bar.

It would certainly be unusual for the Massachusetts court to overrule a prior decision by a strong bench without any suggestion to that effect. It should further be noted that *Tudor v. New England Ins. Co.* was decided only two years after *Baker v. Manufacturers Ins. Co.*, 12 Gray 603, one of the sailing vessel cases relied on by the Respondent, so that the Court evidently considered that a different principle was involved; and the *Tudor* case was specifically approved in *Musgrave v. Mannheim Ins. Co.*, 32 Nova Scotia, 405.

The decisions in *Tudor v. Ins. Co.* and other similar cases cited by the Circuit Court of Appeals, and the *Cory* case, are not inconsistent.

The stranding of a vessel, such as in the case at bar, resulting in the total destruction of her cargo, is proximately caused by perils of the sea.

On the other hand, where there is mere delay on the voyage from normal and natural causes, and the goods arrive a week or two late, there can be no convincing proof that the loss has been in fact due to a sea peril. The condition of the goods on shipment may have been such that even had they arrived in due course they would have been spoiled, nor does mere delay, in and of itself, even though due to rough weather, show that a sea peril has been encountered. Rough seas and gales are an incident to almost every sea voyage, and a delay due to such causes could not be said to be occasioned by perils of the seas—unless extraordinary!

Perry v. Cobb, 88 Maine, 435, also cited by the Circuit Court of Appeals (R. 42), is in the same category as *Cory v. Boylston Ins. Co.*

Whatever force as an authority it might have had, however, it loses by reason of the fact that the court merely refused to set aside an *arbitration award* made pursuant to an agreement of mutual insurance between certain lime manufacturers.

Furthermore, the quotation from *Cory v. Boylston,* cited in the adverse opinion of the Circuit Court of Appeals (R. 42), very forcefully supports the argument here made by the petitioner as an examination of that case will show that the peril there claimed was a mere *normal* prolongation or retardation of the voyage and not a sea peril operating on the cargo as the proximate and efficient cause, as in the case at bar. This is equally true of the *Perry v. Cobb* case.

As to the rider (R. 19-20) it can be no bar to petitioner's claim for it is fair to assume that the parties (two American corporations) contracted in accordance with the law of the land where the contract was made, executed and delivered, and *that* law justifies recovery under the general clause sued on. Respondent's position indeed has been wobbly. Before the District Court it contended that the rider would have specifically covered the present total loss had it not been cancelled. In the Appellate Court, however, when in our opening, we pointed out that the rider had only to do with a *partial* loss, Respondent's counsel admitted the fact and conceded that it did not cover the loss here claimed. The weight of our contention was manifest, for Respondent's counsel, after first discussing the point orally, asked leave to file a special brief on the point, which was *immediately* handed the court, and having, of necessity, been prepared *in advance of the hearing.*

The District Court's opinion was based on the first (total loss) assumption, but it is clear that the second (partial loss) assumption is correct, and it is wholly improper to find that the language of a *partial* loss provision qualifies *or limits, by implication,* a *total* loss provision. In any event, the rider had been cancelled long before the stranding and loss. The policy was dated June 23rd, 1933, the rider first attaching April 4th, 1934, was cancelled January 25th, 1935 and the stranding occurred July 21st, 1935. The rider provided that after its cancellation "All other terms and conditions remained unchanged" (R. 20), and also that after January 16, 1935 and thereafter, the policy covered *"the same as prior to the attachment of that endorsement"* (R. 17).

We are, therefore, relegated to the rights of the parties under the clause sued on as they existed prior to the rider's attaching, which rights are clear under the American law we have cited, and permit recovery in a case such as this, and which is the law of the land where the contract was made. The payment of an additional premium of .35¢ for the rider coverage, so much stressed, is merely atmosphere, but readily enough answered for it is apparent the rider added materially to the coverage in that partial loss claims are much more frequent, and in the aggregate much more costly to insurers, than the relatively infrequent total loss claims, particularly when the former has attached to *"such losses"* the breakdown clause adding many categories under which partial losses could be recovered. This was without application to total loss claims hence the 25¢ rate therefor. And, incidentally, having regard for the voyages insured, viz., from the West Indies to Baltimore, and perusing the clause on which we sued, together with subsequent rider restrictions (R. 5, 6, 11, et cet.), it will be seen that if the

perils of the sea coverage, such as here claimed, was omitted there would be relatively no coverage of *practical* importance which the assured had under that policy.

It certainly can not be fairly said that conditions prescribed for a partial loss situation are applicable as determining a total loss situation. The Court's statement, therefore, that the contention is without point does not seem well founded, since if the place of contract execution and final performance are factors and the contract is to be construed in accordance with American law, as we say it should, *delay* is but an incident or consequence of the stranding (peril of the sea) provision under which we claim, and it can hardly be fairly said that the parties placed any other construction upon it. Surely the inference is that they regarded the clause in the light of American decisions and not of the British law.

It strikes us as very fine spun reasoning to say that Petitioner was insured against "* * * loss caused by stranding but * * * not against loss from delay *incident* to stranding" (R. 45-6), for such reasoning is contradictory since, if we are not entitled to all the damage or loss *incident* to stranding, including delay, the stranding provision is without meaning.

We think the rider considered alone or in connection with the general clause presents no ambiguity and that it is clear the former has no bearing upon the latter, but if the contrary contention of respondent raises an ambiguity and clarification is desired, it should be had by oral testimony which the Record pages 27-28 shows it was hopeless to attempt. However, we submit, having regard for the American law, there can be no ambiguity.

The Petitioner contends, and has contended in both lower courts, that a loss such as here suffered was within the terms of the general clause of the policy (R. 2-3) as decided by The Corsicanna and other American cases herein referred to and, therefore, the rider pleaded (which was *not* a part of the insurance contract at the time of the loss) can not and does not add to or subtract from that clause, as, in fact, said clause covered the loss here sued on.

Assuming, however, *arguendo*, that at the time the rider was entered into the insured was under the impression that he was *not* covered under the general clause for a loss such as here sued on, and actually had this rider attached to cover a loss such as here, which it is conceded by respondent's counsel it did not, could it be argued that after he had later determined that he was covered by the general clause (as practically all American cases hold) and he then stopped paying the additional premium charged him for this rider, and cancelled it, that the effect would be that he would lose the coverage he had under the general clause?

Assuming also, *arguendo*, that after he had paid the additional premium charged for the rider he consulted counsel about the rider and stated he was only interested in being covered for losses to his fruit caused by delays arising from perils of the sea, such as stranding, and that he did not care to pay additional premiums if the general clause covered such losses, and counsel advised him that under the law of America, where his contract was made, as enunciated in this brief, he was covered under the general clause, and acting on such advice he cancelled the rider to save premiums, could it be logically argued that his once having had such a rider took away his coverage under the general clause? or

Assuming again, *arguendo*, that he heard "on the street" that he was paying additional premiums for coverage he already had, and in consequence thereof cancelled the rider, could it be said that the acquiring of this information, though belated, deprived him of the coverage which the courts of his land had decided he had under the clause in question?

So that from whatever aspect we view the rider, it is quite apparent that the test is what was the scope of *its* coverage and the coverage under the *general clause*, and really the sole question here is was the Circuit Court of Appeals right in construing an American made contract by British decisions solely because this court sometime since has said that it was desirable to have the law of the two countries in harmony?

Clearly, before an insurance company could cut down its coverage, as determined by judicial decisions, it would have to be done by the most clear and unequivocal language and not by inserting a rider which covers numerous contingencies, affecting only partial loss claims, and which does not specifically refer to the general clause nor have any application to the particular loss sued on.

But this argument is really academic for the respondent disavowed its original contention below and was forced to admit at the bar of the Circuit Court of Appeals that the rider had nothing to do with the case other than "by inference," although they then argued that that inference should limit an actual contractual obligation which had been imposed long ago by the judicial decisions of this country.

That the decision of the Circuit Court of Appeals in this case has caused hopeless confusion in the law on an

important contract of this kind, which is in general use, is best illustrated by the fact that in any case where the amount involved is less than $3,000.00, even though diversity of citizenship does exist, or where the amount involved is unlimited where diversity of citizenship does not exist, the insured by bringing his suit in the State forum would recover a loss such as here, but where diversity of citizenship exists and the amount in controversy is in excess of $3,000 the insured could not recover for, of course, the insurer would remove the case to the Federal Court. In Baltimore City for instance as the State court is just across the street from the Federal court, it means that the construction put on this contract depends solely on whether you happen to be on the West or East side of the street—and this case was so removed. Certainly, in a situation of this kind, rank injustice is clearly done one party or the other and which it would seem calls for the intervention and action of this Honorable Court.

And finally we reiterate the language of Mr. Justice STORY in *Magoun v. New England Marine Ins. Co., supra,* that a decision other than in accordance with our contention *"would shake the confidence of the commercial world in the supposed indemnity held out by policies against the common perils."*

It is respectfully submitted that the *writ of certiorari* prayed for should be granted.

GEORGE FORBES,
HENRY L. WORTCHE,
Counsel for Petitioner.

(Emphasis ours throughout.)

Dated at Baltimore, Md., May 11, 1937.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 983.

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., A BODY CORPORATE,
Petitioner,

vs.

UNIVERSAL INSURANCE COMPANY,
A BODY CORPORATE,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

But for the fact that respondent's brief bases an argument in opposition to our Petition for Writ of Certiorari on matters wholly outside the record, we would not give it reply, but since that argument is based, not only on facts not of record, but on an erroneous statement of facts, as shown by the ship's log, we cannot let the statements go unchallenged.

The pleading point, discussed on page 2 of Respondent's brief, is not only wholly without merit, but it should be noted was *not* raised in either court below, and was clearly designed to be read with their erroneous statement on page 4, where it is said, "* * *, the ship was delayed for a few hours, but successfully overcame the sea peril and completed the voyage."

There is not only no proof of the statement, but the facts (well known to the respondent through their representatives who boarded the vessel when aground), were, as follows:

The Smaragd sailed from Baracoa, Cuba, for Baltimore, at 3:30 P. M. [Wednesday] July 17th, 1935. Grounded on Seven Foot Knoll at 11:35 P. M. [Sunday] July 21st, 1935. Floated [Saturday] July 27th, 1935, at 3 P. M., but prior to floating entire cargo rotted, was destroyed, discharged on lighters and dumped overboard, and voyage, therefore, never completed.

These facts are outside the record, as is their statement that "the ship was delayed for a few hours, but successfully overcame the sea peril and completed the voyage", and are only submitted because of the gratuitous and erroneous statement above quoted.

On page 3, they also say, "in the case at bar, however, the vessel completed the voyage without expense due to the stranding * * *". There is also no proof of this statement in the record, and it is untrue in fact, as evidence, known to respondent, which we were precluded from presenting by the District Court, would have clearly shown (R. 27-8).

These and other matters in respondent's brief seem primarily directed to an effort to direct the mind of the Court to other than the vital issue of proximate cause here involved, the American Rule being in conflict with the British Rule, and the former being that which petitioner says should be here applied.

Dated June 21st, 1937.

Respectfully submitted,

GEORGE FORBES,

HENRY L. WORTCHE,

Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 57.

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., PETITIONER,

vs.

UNIVERSAL INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

GEORGE FORBES,
HENRY L. WORTCHE,
Attorneys for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 57.

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., PETITIONER,

vs.

UNIVERSAL INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

The Petitioner having received the Printed Record from the Clerk on October 29th, 1937, and having fully covered its contentions in support of a reversal of the judgments of the United States Circuit Court of Appeals for the Fourth Circuit and the District Court of the United States for the District of Maryland, in its Brief in support of its Petition for Writ of Certiorari, and its Reply to Respondent's Brief in opposition thereto, adopts those two

briefs as its brief in this case, adding, however, several additional citations on the issue of proximate cause as relating to losses on marine insurance policies.

The additional citations are:

Tyson vs. Union Ins. Co., 9 Fed. (2nd) 356; (D. C. N. D. Cal.);
The Santa Rita, 176 Fed. 890, (C. C. A. 9);
Aetna Ins. Co. vs. Boon, 95 U. S. 627; 24 L. Ed. 395;
Insurance Co. vs. Tweed, 17 Wall. 44, 19 L. Ed. 65;
Brady vs. Insurance Co., 11 Michigan 425.

It is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit and the District Court of the United States for the District of Maryland, should be reversed and the case remanded to the District Court for trial, with costs.

Respectfully submitted,

GEORGE FORBES,
HENRY L. WORTCHE,
Attorneys for Petitioner.

Dated, Baltimore, Maryland,
October 30th, 1937.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 57.

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC.,

Petitioner,

vs.

UNIVERSAL INSURANCE COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

GEORGE FORBES,
HENRY L. WORTCHE,
Counsel for Petitioner.

The Daily Record Co. Print, Baltimore.

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Winter on Marine Insurance, 2nd Ed. (1929), p. 97 6

The following cases cited in Brief on Behalf of Petitioner will be found on page 2 of that brief:

Aetna Ins. Co. vs. Boon, 95 U. S. 627; 24 L. Ed. 395.

Brady vs. Insurance Co., 11 Michigan 425.

Insurance Co. vs. Tweed, 17 Wall. 44, 19 L. Ed. 65.

Santa Rita, The, 176 Fed. 890.

Tyson vs. Union Ins. Co., 9 Fed. (2nd) 356.

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 57.

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC.,

Petitioner,

vs.

UNIVERSAL INSURANCE COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

INTRODUCTORY.

The Court is first referred to our brief in support of our petition for certiorari and also our *reply brief*, since these two briefs we have adopted as our main brief in this Court. The record references in those briefs are, of course, to the "Original" transcript and not to the "Print". (See Brief on Behalf of Petitioners.)

SECOND. The Court's attention is called to the persistent reference in respondent's brief to our damage as "Delay Damage", when in point of fact, it is a *stranding, or peril of the sea, damage.* It is adroit, of course, to

refer to it as "Delay Damage", for that meshes well with the English decisions on proximate cause on which they rely; whereas *stranding* damage is in accord with American decisions on proximate cause on which petitioners rely. The English cases hold proximate cause is that cause which is last in point of time—the American cases hold that proximate cause is that which is the *efficient* cause. Stranding here was the first, efficient or proximate cause and not the ensuing delay.

THIRD. It is to be noted there is persistent effort to stand with great strictness on the pleadings and shut off facts well known to respondent, although they augment their argument by erroneous and gratuitous amplifications of the factual situation to which we have had to reply.

FOURTH. At p. 4, Point I, they present as the only issue in this case a point which is *not* the issue here involved. The concrete issue is correctly stated at p. 6 of our petition for certiorari, as amplified at p. 10 in our brief in support thereof and is:

> **"Does the standard general clause of the marine cargo insurance policy here involved, insuring against losses caused by perils of the sea, cover loss of a cargo of bananas where the vessel was subjected to a maritime peril, viz.: stranding, which resulted in frustration of the venture, the rotting of the bananas and their total loss?"**

This, *the vital, actual issue in the case*, is fully discussed in that brief at p. 10 *et seq.* (q.v).

FIFTH. Emphasis ours throughout and Record references are to "Print" Record.

THE PLEADINGS.

The attempt of the respondent to confuse the issue by raising a belated point as to the sufficiency of the petitioner's declaration can hardly now be taken seriously. It was not raised in either lower court and a cursory reading of the colloquy between the District Court and Counsel at the conclusion of the hearing of petitioner's demurrer to respondent's pleas clearly shows there was no question as to the sufficiency of the petitioner's declaration (R. 22-3).

We were not offered opportunity to "enlarge and modify the Record", but offered an additional "pleading" which meant simply nothing, as the Court's order at R. p. 23 so clearly shows.

Eagerness to rest this case on the pleadings is here and everywhere apparent in their brief. They prefer to conclude the issue on the Court's interpretation of a judicially found ambiguity and shut out "all that had gone before".

The District Judge said: "I find that the ambiguity surrounding the language of the original policy permitted, in fact called for, a consideration of everything that had gone before" (R. pp. 21-22). The colloquy following shows the futility of further proof of any kind, (R. pp. 22-23).

We did not "Elect" (p. 2) to stand on the pleadings but were forced to despite the Court's finding that the case called "for a consideration of *everything* that had gone *before*".

Their brief abounds in statements unsupported by the record. Of course, bananas are a highly perishable

cargo, but to say that the delay due to the stranding was a "short period" is wholly untenable, for delay is a relative term, and a delay about six days longer than the normal voyage time of four days cannot be regarded as a short period, nor can it be said that the vessel was not damaged, as the case stands, nor that she did not depart from the course of her regular voyage, for her grounding negatives that contention. It is, of course, absurd to unqualifiedly state, in view of our briefs, that it is not suggested the cargo suffered any damage except as a result of its own inherent vice.

As has heretofore been stated and reiterated the only question in this case is a question of law, viz. whether the general clause of the marine cargo insurance policy here involved insuring for loss caused by perils of the sea, covers a loss where a marine peril, viz. *stranding,* has caused the loss of the cargo of fruit by so delaying the voyage that the cargo has become a total loss.

The declaration filed herein (R. pp. 1-2) and the District Court's opinion (R. p. 17) fully and sufficiently cover that point and put before this court the question here involved.

But, in view of the fact that respondent attempts to make something of this point, we feel that if this court felt there was anything in it, it would, to do substantial justice, remand the case with directions that petitioner be permitted to amend its declaration if it is not sufficienly specific.

All the questions raised under this phase of the case by respondent could, in any event, only be passed upon after all the evidence was in, on proper instructions by the trial court.

The court will bear in mind that we have never had an opportunity to present evidence in support of our case.

We feel that in view of the fact that the respondent has so strongly urged this point in this court, (which was not raised in either court below), that the court should know the facts as to which petitioner would adduce proof in support of its declaration on the trial of the case.

The Smaragd loaded her usual cargo of bananas at Cuba and stranded just outside of Baltimore (which became her port of refuge when floated) and remained aground for about a week despite repeated efforts to float her. (See petitioner's reply brief on Certiorari, p. 2.)

Finally, the fruit rotted and became a total loss, had to be discharged from the vessel on to lighters and from them dumped. The respondent knew these facts from their representatives who were aboard after her grounding and from reports given to them by Petitioner. The vessel later was floated, came to Baltimore, *without* its cargo, and was drydocked for survey and any repairs found necessary.

To suggest that the voyage was not frustrated by this stranding is wholly untenable in the light of these facts, all of which will be shown at the trial. The voyage of the Smaragd was to bring a cargo of bananas to Baltimore, which she failed to do because she stranded and the cargo had to be taken off on account of the stranding and became a total loss, and the vessel therefore never brought her cargo into port. What could be more a frustration of a voyage?

The question, therefore, clearly before this court is to determine whether the British or American rule of *proximate cause* relating to marine cargo insurance policies is to be applied.

This case cannot be distinguished from *Brandyce, et al., vs. U. S. Lloyds, Inc.*, 207 App. Div. 665, 203 N. Y. Supp. 10, affirmed *per curiam*, 239 N. Y. 573, 147 N. E. 201, and the cases therein cited in support thereof, and *no attempt was made to do so by respondent in the two lower courts.* Their argument there consisted entirely of the proposition that the British rule was more logical and was supported by *Perry vs. Cobb* and *Cory vs. Boylston Ins. Co.*

As heretofore stated the question in this case comes down to whether the stranding alleged in the declaration was the proximate cause of the loss of the cargo of bananas. We subscribe to the proposition that ordinary delay in a voyage causing the cargo to deteriorate is not covered by a policy such as in this case, but where deterioration is brought into operation by a cause insured against, such as here, viz. stranding, it has been held by the American authorities to be covered, *as one of the perils insured against was the proximate cause of the loss.* (See Petitioner's Brief in Support of Petition for Writ of Certiorari, pp. 16-35.)

At page 13, respondent quotes from Winter on Marine Insurance, 2nd Ed., p. 97, but significantly fails to carry the quotation for six further lines, which we here supply:

> "A recent decision in New York, while confirming this general rule, held that where the *delay* resulted from a marine peril and, as a consequence of such delay, deterioration commenced, the underwriter was liable for the resultant loss, the *proximate cause of the loss being the marine peril and not the delay.*"

The respondent's argument on pp. 13 and 14 puts forth supposititious cases, none of which apply to the facts here, and in any event could only be *fairly* argued after the evidence was in. In addition it puts forward propositions which would necessarily be affirmative defenses on its part and which it could only sustain after they had produced evidence in their support.

The argument of respondent as to sea perils "successfully overcome" is clearly not in point. How can it be argued that the sea peril was successfully overcome when the vessel's voyage was not completed and the bananas not delivered at destination—because of the stranding?

The argument is wholly inapplicable to the case at bar. The stranding here actually occurred and is so alleged in the declaration. How an argument can be made on the basis of a sea peril "successfully overcome" which peril caused the cargo's total loss, is difficult to appreciate. *Jordon vs. Warren Ins. Co.*, 1 Story 342, cited in support of this argument is clearly inapplicable. The Respondent then says:

> "If the damage in this case had been directly due to a sea peril, that is, if the ship had sunk or burned or sea water had injured the cargo, the underwriter would unquestionably be liable, but where the cargo suffered no physical damage through any peril of the sea there is no liability."

That is just what happened in this case, a sea peril, viz., *stranding* caused this cargo of bananas to be destroyed, and clearly sustains Petitioner's contention. The loss of the fruit was directly due to *this* peril of the sea.

Certainly, Mr. Justice Story in the Jordon-Warren case did not change the rule he laid down in ***Magoun vs. Ins.***

Co. fully referred to and quoted from in petitioner's brief in support of petition for writ of certiorari at pp. 27-29.

Bond vs. The Superb, 3 Fed. Cas. 845, cited at p. 9 and quoted from at p. 23 of respondent's brief, was a general average case and had nothing to do with a suit on an insurance policy. In that case the Superb, while on a voyage from Palermo to Philadelphia, had been obliged by bad weather to put into the port of St. Thomas. Part of her cargo, which consisted of fruit, was discharged at St. Thomas for the purpose of making repairs, but was afterward reloaded. On arrival at Philadelphia it was found that the fruit was rotten. According to the evidence it had apparently begun to rot even before arrival at St. Thomas. The owners of the fruit brought suit against the ship on some theory that the discharge at St. Thomas entitled them to claim all of the damage in general average. We are at a loss to see how this case, which rests on principles of general average, and not on the terms of a contract of insurance, bears on the case at bar.

And the case of *The Casey,* 30 Fed. (2nd) 136, cited, at p. 9 and quoted from at p. 24, was also a general average case, and was decided on the law as applying to general average and not on an insurance contract. In that case Judge Woolsey indicates that as to a contract of insurance *The Corsicanna,* supra, was properly decided. (See quotation therefrom p. 35, Brief in Support of Petition for Certiorari.)

The quotation on p. 11 of respondent's brief from Arnould on Marine Insurance, an *English* publication, 11th Ed. (1924) Sec. 778, is based entirely on the British cases of *Taylor vs. Dunbar* and *Pink vs. Fleming,*

fully discussed in our brief in support of petition for certiorari (pp. 10, 11, 20), and shown not to be applicable here.

At p. 12 of respondent's brief it quotes from 1 Phillips on Insurance, Sec. 1134, where, after stating that the

> "* * * assured must bear the loss arising from the qualities of the article insured, *without any direct action of the perils insured against,* * * *".

the quotation continues:

> "Accordingly, where a vessel was compelled by sea-damage to put into Martinique to repair, for which purpose it was necessary to discharge the cargo, a part of which consisted of porter and claret, which were liable to be spoiled by the heat of the climate, were necessarily sold. The loss was held not to be such a consequence of the perils of the seas, by which the vessel had been damaged, as to render the insurers of these articles liable for the loss. The loss arose from the action of the climate on the articles, and as this was a damage at the risk of the assured, he was not the less liable for it because it had been indirectly and incidentally aggravated by the delay occasioned by the perils of the seas which were insured against."

This quotation might be of some assistance to the respondent were it not obviously based on an entire misapprehension by its author.

The decision cited as authority by Phillips for the above statement is *Goold v. Shaw,* 1 Johns Cas. 293. In that case the action was not brought, as *supposed* by Phillips, on a policy covering *the cargo,* but on a policy covering *the ship.*

The facts were that the plaintiffs had insured *the ship* Astrea from New York to certain ports in the East Indies, with liberty to touch at several intermediate places, the risk to continue until the vessel's return to New York.

Shortly after the Astrea sailed she was overtaken by a violent storm and her master was obliged to put into Martinique as a port of refuge. The cargo, a large part of which consisted of claret and porter, was discharged on the beach in order to repair the ship. Owing to the heat of the climate and the necessity of exposing the claret and porter to the sun it was deemed advisable to sell it. After the completion of the repairs, which were made at a comparatively small cost, the Astrea returned to New York, inasmuch as the loss of the claret and porter made the continuation of her voyage to the East Indies an unprofitable one.

The suit, as has been stated, was brought on a policy covering the hull of *the ship,* and had nothing to do with insurance on the cargo, which cargo may or may not have been insured. Incidentally, judgment was given for the underwriters by an almost evenly divided court, Kent, J., (who wrote the opinion in Williams v. Smith, our brief in support of petition for certiorari pp. 10, 11, 18), giving the deciding vote in favor of the underwriters.

Radcliffe, J., who delivered the principal judgment in favor of the underwriters, pointed out that

> "although the same dangers await them (the subjects of insurance), they are considered as distinct and independent of each other, and liable to different results. * * * the freight and cargo, or either, may be wholly lost, and the ship saved * * *" (1 Johns Cas. at p. 295).

The grounds of the judgment of Mr. Justice Kent were that, inasmuch as the damage to the hull was but slight, and, as the sale of the wine did not defeat the object of the voyage, the underwriters could not be held liable for a total loss of the ship. He said.

> "But the weight of evidence is, that the ship was not so injured as to be worth less than half of her value. It appears that she might have been repaired for one-fifth of her value, and that she was actually repaired and returned from Martinique to New York. The sale of the liquor, admitting the sale to have been a direct and necessary consequence of one of the perils in the policy, ought not to be considered as defeating the voyage. The liquors constituted only a small freight for a ship of 400 tons, and a principal object of the voyage must have been the homeward freight from the East Indies.
>
> "* * * Neither the subject insured nor the voyage was lost. And, indeed, I think it is a question (though not necessary now to be discussed and decided) whether on a policy on a ship, the insured can abandon while the ship is safe, in consequence of the loss of cargo, and whether the true rule of law be not that the subject insured must be either actually lost or so injured as thereby to occasion a loss of the voyage before it can be abandoned." (1 Johns Cas. at pp. 308-309).

It is plainly evident from the language used by Mr. Justice Kent that he considered that there was a total loss of cargo for which its underwriters would be liable.

The very fact that the decision was such a close one shows that it was practically conceded by the underwriters that the loss of the claret and porter was proximately due to sea perils, and that their only grounds of defense were either that there was no loss of the ven-

ture, or else that the loss of the venture did not entitle the insured to recover on a *hull* policy.

The statement of Phillips, therefore, is founded on a wholly erroneous reading of the decision on which it is based. The *quotation, relied on by respondent,* is accordingly entitled to no weight as authority.

This case, as also the cases of *Williams vs. Smith,* 2 Caines Rep. 1, and *Tudor vs. New England Ins. Co.,* 12 Cush. (Mass.) 554, are the authority for Lord Esher's statement in *Pink vs. Fleming,* L. R. 25, Q. B. D. 396, quoted on p. 23 of our brief on our Petition for Certiorari.

The argument at page 20 of respondent's brief that the question here involved is not one of causation, but coverage is another attempt to confuse the issue. Certainly, we agree that the question is one of coverage, but the coverage is to be determined by the question of causation. That is the only reason for the difference between the cases decided by the British Courts and those decided by the American Courts, the British Courts holding that the last cause in point of time is the proximate cause, whereas the American Courts hold that the proximate cause is the *efficient* cause, in this case stranding, which brought about the delay and subsequent rotting of the fruit, and as that was one of the perils insured against under the General Clause, the insurer-respondent must answer. To suggest that the question here is not one of causation is simply untenable when the authorities, both on behalf of the petitioner and respondent, are considered. It is clearly a case of causation determining the coverage!

The decisions in Massachusetts and Maine put forward as authorities in support of respondent's contention (pp. 21-23) are clearly inapplicable.

(See argument in Petitioner's Brief on Certiorari, pp. 36-39.)

Taylor vs. Dunbar and *Pink vs. Fleming*, the British cases strongly relied on by the respondent, lay down the British rule, which we submit is contrary to the American rule. However, *Taylor vs. Dunbar* simply illustrates the rule that mere delay is not covered by the general clause of a marine cargo insurance policy. (See also Petitioner's Brief on Certiorari, pp. 10-12.)

Pink vs. Fleming, however, was decided, professedly, without reference to the American authorities, and has been criticized in other decisions (Petitioner's Brief on Certiorari, pp. 16-30). It, furthermore, is illogical, and at variance with the *Leyland* case in the House of Lords. (See Petitioner's Brief on Certiorari, pp. 11 and 20.)

The Alps, L. R. 1893 Probate Div. 109, might well have been cited in the petitioner's brief, inasmuch as the court there held that the plaintiff was entitled to recover a loss of freight due to delay.

Reischer vs. Borwick, L. R. 1894, 2 Q. B. 548, had to do with a claim on a hull policy, the question before the court being whether the proximate cause of the loss was a collision or the failure of the insured to make proper temporary repairs. It has no application to the present case.

Inman Steamship Co. vs. Bischoff, L. R. 7 A. C. 670, resembles *The Alps; supra*, except that in *Inman vs. Bischoff*, the court held that the loss of time freight,

which the plaintiffs sought to recover from their freight underwriters, was due to an option given the Portuguese Government (the charterers) to make a deduction from hire in case the ship became inefficient. This case also has nothing to do with a claim under a cargo policy.

That the proximate cause rule, as relating to marine cargo insurance policies in America, is contrary to the rule laid down in England by *Pink vs. Fleming,* is exemplified by the case of *Muller vs. Globe & Rutgers Fire Ins. Co.* (C. C. A. 2), 246 Fed. 759, wherein at page 762, Judge Hough, speaking for the court, said:

> "But the problem still remains whether the Canadia's loss was proximately due to sea peril, and solution primarily depends on the meaning of 'proximate', as construed by judicial commentators. *That cause is proximate which sets the other causes in motion;* only when causes are independent is the nearest in time looked to. Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395, a case whose facts are instructive and interesting. *If there is an unbroken connection between act and injury, the act causes the injury; an intervening act is not the proximate cause of injury, unless it is efficient to break the causal connection* (Milwaukee, etc., R. R. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256)".

It would seem, therefore, that the American courts have adopted the logical rule as to the doctrine of proximate cause relating to marine insurance policies, and not the strained and illogical rule laid down in *Pink vs. Fleming,* which has *never been approved by any American court,* and expressly *disapproved* in The Corsicana case *supra.*

THE RIDER.

The policy was dated June 23, 1933. The rider in question was dated April 4, 1934 and was cancelled on January 25, 1935, as of January 16, 1935 (R. pp. 13-14). The stranding was on July 21, 1935 and, therefore, at a time when the rider of April 4, 1934 was not a part of the policy.

There are numerous reasons why this rider has not the most remote bearing on the issue here involved. Amongst them are these:

1. The rider, by its terms, had *solely* to do with *partial* loss (particular average) coverage—whereas, the claim here is *solely* for a *total* loss under the general policy clause (R. pp. 15-16; 3-4; and Brief on Certiorari, pp. 39-40).

2. No *intent* of the parties, as to the scope of the coverage under the general policy clause, dated June 23, 1933, can be deduced from the language of this rider, as not *in existence* until attached on April 4, 1934, and deleted by cancellation *before* July 21, 1935, the date of the stranding (R. pp. 8; 15-16; 13-14, and Brief on Certiorari, p. 43, par. 4).

The District Court decided this issue by accepting the language of the cancelled rider, as indicative of an intent not to cover this type of loss when the rider had only to do with partial loss provisions and the claim here was for a total loss under the general coverage clause.

The basic error of that holding is found in the fact that you certainly cannot deduce intent as to the coverage of the original general, or total loss, clause of the policy issued in June, 1933, from the provisions of a

partial loss clause added to the policy nearly a year thereafter. So there was not only misinterpretation of what the language of the partial loss clause provided, but there was distinct impropriety in considering it at all as indicative of an intent, or the meeting of the minds of the parties, nearly a year before the rider was attached.

3. It is patently improper and indeed impossible to construe an earlier clause by a later clause, when one deals solely with one type of coverage and the other solely with another, and the latter makes no reference whatever to the former (Brief on Certiorari, p. 40, par. 1, and p. 43, par. 3).

(4) It is manifestly impossible to alter a general policy clause by a special policy clause without employing specific and unequivocal language so indicating—and improper so to attempt (Brief on Certiorari, p. 43, par. 3).

(5) No change in a policy clause coverage can be made such as its enlargement, modification or restriction, by inference or implication (Brief on Certiorari, p. 43, par. 3).

When, at the argument in the Circuit Court of Appeals, petitioner pointed out that the rider had solely to do with particular average (*id est* partial loss claims), respondent's counsel admitted the fact and contended that it only "*by inference*" changed the general coverage clause, whereas below they had vigorously argued that it unequivocally covered total loss claims.

(6) No such rider could be taken as "conclusive" of contractual intent under the general policy clause (sued on), as held by District Judge Coleman, when he found

the latter ambiguous and held (quite correctly—*if* ambiguous) that the language of the policy

> "* * * permitted, in fact called for, a consideration of *everything* that had gone *before*,"

for this rider was attached nearly a year *after* the event (R. p. 15).

The propriety of the Court's finding is therefore negatived by its own ruling.

It is also pertinent to note that *if* the general coverage clause was ambiguous and *everything* that had gone before should have been considered that, in point of fact, *nothing* was considered that had gone *before!*

Furthermore, the District Judge placed his ruling squarely on the rider, ignoring the law of his land, whose Courts had met the issue squarely, and had held that the general clause sued on fully covered the claim here made (The Corsicana, *Brandyce vs. U. S. Lloyds, supra*).

And finally as the rider *only* attached, long *after* the event, and made no reference to the general clause sued on, it was patently irrelevant and inadmissible as evidence (R. pp. 22-3), but, even if admissible, would throw no light, under the facts, on the *intent* of the parties when the policy was *first* issued (Brief on Certiorari, p. 41, par. 4, and p. 42, par. 1, R. pp. 16, 22-3).

(7) The rider (dealing *only* with partial loss contingencies) expressly stipulated, on its face, that—

> "All other terms and conditions remain unchanged" (R. p. 16, and Brief on Certiorari, p. 40, par. 1).

So that manifestly the total loss coverage under the general clause remained unaffected.

(8) This rider's cancellation clause specifically provided that—

> "Thereafter this policy covers the same *as prior* to the attachment of said endorsement" (R. p. 13-14, and Brief on Certiorari, p. 40).

The sole question, an issue of law, therefore is "What was the coverage under the general policy clause *'prior* to the attachment of said endorsement' ", and the American law is indisputably that Plaintiff-Petitioner is entitled to recover for the total loss of its fruit cargo, since its *proximate* cause was the vessel's stranding (sea peril) causing delay which caused it to rot and become a total loss (The argument, supra, and that in our Brief on Certiorari, p. 40, fully covers this point).

Certainly the lengthy and complicated argument of astute counsel on pages 30 to 38 of their brief in their discussion of this point, is more conclusive of the fact that there was never any such meeting of the minds of Tony Lanasa, the president of petitioner's company, and the underwriters' agent, than that there was, and that, therefore, no "intent" could be deduced, therefrom, even "*by inference,*" since counsel's laborious endeavors, in an elaborately refined argument, to develop this intent is not persuasive that any such intent was considered, or indicated, by the parties, when the rider made no reference, specific or otherwise, to total loss claims. The argument defeats itself.

Furthermore, the change of position by counsel above from the position they took below as to what the rider's coverage actually was, makes it (in their viewpoint) an ambiguous rider and it would be manifestly improper

by the application of such a rider to the general coverage clause to change its provisions, since the language of that specific clause has been judicially adjudicated in *The Corsicanna* case to be *un*ambiguous and to cover the total loss here sued for.

In the District Court, they vigorously contended that the rider unequivocally covered total loss claims, but in the Circuit Court of Appeals that it only did so by inference. This change of position was taken after petitioner's counsel had called the court's attention to the fact that the rider dealt exclusively with particular average. The rider, therefore, did not cover specifically, unequivocally or even inferentially, total loss claims and the contention that the intent of the parties was so to cover total loss claims is wholly illogical on the face of the two clauses wholly aside from the interpretation of the general coverage clause by the American Courts.

It certainly cannot be contended, with any seriousness, by the respondent that the rider changed their legal obligation under the general clause.

The rider, as also appears, contained provisions regarding insurance under the breakdown clause, as solely applicable to partial losses, and as heretofore shown, was placed on the policy actually some ten months after the policy, *with the general clause,* was issued. If the loss here was covered under the general clause in accordance with the law heretofore argued in this brief, and in the brief on certiorari, certainly language that even counsel was not certain of, as shown by their different contentions, could not take away the vested rights of the petitioner under the general clause.

If the respondent had not intended to originally insure the petitioner for a loss, such as suffered here, in accordance with the American law, where the contract was made, but intended to be governed by the decision of the British Court in *Pink v. Fleming* and the Merchant Marine Insurance Act of England, the only way it should be permitted to do so is by clear, unmistakable and unequivocal language, showing its intention not to be bound by the American law, and not be permitted to argue inference on inference, as they do, to defeat the petitioner's rights under the general clause, as construed by the American courts.

There certainly can be no ambiguity in a clause which has been specifically construed by courts of high authority as has this clause in America. The only ambiguities, here present, are in the varying interpretations of *the rider* by respondent's counsel, and the relevancy of its application, *if* it had *not* been cancelled to construe an *un*ambiguous general clause is clearly negatived.

If respondent desired to limit its liability under the general clause, it should have had the commercial courage to say so plainly and openly in its policy as was done in *Fireman's Fund Insurance Co. v. Trojan Powder Co.*, 253 Fed. 305, wherein a clause provided:

> "Warranted free from any claim consequent upon loss of time, whether arising from a peril of the sea or otherwise."

The authorities cited by the respondent on this point are not applicable to the facts here. In none of them was there a provision of a contract which had theretofore been judicially construed, as is the case here, and, therefore, in this case the general clause did not have

to be construed by the conduct of the parties. This policy was to be interpreted in accordance with existing judicial decisions as to the law, and it was, therefore, not necessary to look further.

Mercantile Trust Co. vs. Columbus Water Works, 161 Fed. 135.

As the general clause was not ambiguous, having years before the execution of this policy, been judicially construed by courts of high authority, the conduct of the parties, even if contrary to the terms of the contract, does not affect its terms.

Fairfield vs. Lowrey, 207 Mass. 358, 93 N. E. 598.

What we have here said, as also what we said in our Brief on Certiorari, fully covers and answers respondent's argument on this point, but we add, in conclusion, that it would be against all reason and logic to permit this respondent to relieve itself of an obligation under the general clause, for which the petitioner has *paid, "as agreed"* (R. p. 4), by construing a partial loss rider, having nothing to do with a total loss, placed on the policy nearly a year after it had been in force, and when unquestionably, if the American law is applicable, the petitioner would be covered. Certainly that rider could not reduce or restrict the coverage under the general clause, and if the general clause covered before the rider attached it also covered after the rider was cancelled, and is clearly out of the case.

The refined reasoning of the respondent employed to make this partial loss breakdown clause rider hark back to the general clause and take away adjudicated

rights of the petitioner thereunder, surely cannot be accepted when regard is had for the familiar rule that policy terms are to be strictly construed against the insurer who begets them, as also the rule applicable to insurance policies that coverage cannot be reduced or curtailed, unless it is done by specific, unmistakable and unequivocal language.

CONCLUSION.

The judgment and order of the United States Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court of the United States for the District of Maryland, should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

GEORGE FORBES,
HENRY L. WORTCHE,
Counsel for Petitioner.

Dated, December 8th, 1937.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. [redacted]-57

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., A BODY CORPORATE,
Petitioner,

vs.

UNIVERSAL INSURANCE COMPANY,
A BODY CORPORATE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

D. ROGER ENGLAR,
FRANK B. OBER,
Counsel for Respondent.

The Daily Record Co. Print, Baltimore.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 983.

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., A BODY CORPORATE,

Petitioner,

vs.

UNIVERSAL INSURANCE COMPANY, A BODY CORPORATE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

This brief is filed in answer to a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, which affirmed the decision of the United States District Court for the District of Maryland. The opinion of the District Court is reported in 16 F. (s) 912. The opinion of the Circuit Court of Appeals has not yet been reported but will be found on pages 36-46 of the record.

The case involves a loss of a cargo of bananas. The successful carriage of this highly perishable commodity is dependent upon such factors as the condition of the fruit when loaded, proper stowage, temperature, whether the weather conditions permit the hatches to be kept open, and whether the direction of the wind aids or destroys the efficiency of the ventilators, as much as upon the mere length of the voyage.

The Petitioner, though claiming that the loss was proximately caused by stranding delay, has failed to set forth the absence of any of these other causative factors. The absence of the usual allegations that the fruit was sound and would have arrived safely but for the stranding, or that the stranding was the proximate cause of the loss, or, indeed, that the stranding resulted in any considerable delay at all, makes the declaration insufficient to set forth a cause of action. As the declaration must be construed against the pleader (*Poe on Pleadings,* Sec. 557), and it is equally possible under the declaration to attribute the loss to heavy weather delay prior to the stranding, improper stowage, unsound fruit, or bad wind conditions, the demurrer to the declaration would have had to be sustained in any event, since the demurrer to the pleas mounts up to the first error in the pleading (*Poe on Pleadings,* Sec. 706). The question raised by the petitioner is not, therefore, squarely presented. Nevertheless, we wish to answer briefly the four reasons for review, upon which the petitioner relies (R. 6-7).

I.

Petitioner's claim that the Ninth Circuit Court of Appeals would have decided contrary to the Fourth Circuit Court, *if* the same question had been presented there before the decision in the case at bar, is too far fetched to

require serious consideration. The case relied upon (*Fireman's Fund Insurance Co.* v. *Trojan Powder Company,* 253 Fed. 305) merely held that where a vessel was prevented from completing her voyage by stranding, a cargo insurer whose policy contained an agreement to pay forwarding charges, was liable for the expense of transshipment,—the Court pointing out that there was no damage to the cargo. In the case at bar, however, the vessel completed the voyage without expense due to the stranding; and an entirely different question is presented, namely, whether the insurer is liable for loss due to deterioration of the cargo from inherent vice during delay.

As the policy in that case provided for English law, and as even the petitioner concedes that the English law is against it on the facts of this case, it is clear that the Fireman's Fund case cannot be cited as an authority in the present case.

II.

There are no allegations whatever in the declaration justifying the argument that the policy in question was a New York policy and should be governed by New York law. As the declaration must be construed against the pleader, such facts cannot be *assumed.* Even if we speculate as to facts not alleged by the pleader, the evidence indicates that the contract was not a New York contract, because the insurer was a New Jersey company and the policy in all probability was delivered in Maryland (R. 15). In any event, as the Circuit Court of Appeals has pointed out (R. 44), under the well settled decisions of this Court, the Federal courts follow the general law, and are not bound by State decisions.

III.

There is no merit in the claim that, as a question of general law, the case has been decided in a manner "probably untenable" and in conflict with the weight of American authority.

The English law denies liability for delay damage under this form of policy, which is the usual form of Lloyd's Cargo Policy.

> *Taylor* v. *Dunbar,* L. R. 4 C. P. 206; 38 L. J. C. P. 178; 17 W. R. 382.
> *Pink* v. *Fleming,* L. R. 25, Q. B. D. 396.
> *Arnould on Marine Insurance,* 11th Ed., Vol. 2, Sec. 778.
> 17 (*Halsbury*) *Laws of England,* Sec. 859.
> *Marine Insurance Act of 1906,* Sec. 55 (2) (b).

As this Court said in *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co.,* 263 U. S. 487, 493:

> "There are special reasons for keeping in harmony with the marine insurance laws of England the great field of this business. * * * We repeat that we are dealing not with general principles but only with the construction of an ancient form of words, which always have been taken in a narrow sense * * *"

As pointed out by the Circuit Court of Appeals (R. 44), this states a well established doctrine supported by numerous decisions. The rule is particularly applicable in a case such as the case at bar, where the question is whether to follow the settled decisions of the English Court in interpreting the "ancient form of words" in an English form of marine insurance policy. As pointed out in the opinion of the Circuit Court of Appeals, the English rule has been followed in *Cory* v. *Boylston Fire &*

Marine Insurance Co., 107 Mass. 140, and in *Perry* v. *Cobb*, 88 Maine 435. See also:

Bond v. *The Superb*, 1 Wall. Jr., 355, 3 Fed. Cas. 1624.
The Casey (D. C. N. Y.), 39 F. (2d) 136, 138.
1 *Phillips on Insurance*, Sec. 1089.
Jordan v. *Warren Insurance Co.*, 1 Story 342, 352.
38 *C. J.* 1097.

The petitioner's statement that the earlier Massachusetts case of *Tudor* v. *New England Insurance Co.*, 12 Cush. (Mass.) 554, is contrary, ignores the existence in that case of actual physical damage due to salt water (p. 555) and the fact that the Massachusetts rule is clearly laid down in accord with the English authorities in the later case of *Cory* v. *Boylston*, 107 Mass. 140, supra.

The only jurisdiction in this country which in any way indicates a view contrary to the English law, is New York. *The Corsicana, Brandyce* v. *U. S. Lloyds*, 203 N. Y. S. 10, affirmed per curiam, 239 N. Y. 573.

It seems too early, however, to determine that the New York State Court has departed from the rule prevailing elsewhere, for the Court of Appeals gave no opinion in the case, and the Appellate Division specifically stated (203 N. Y. S. 10, at page 14) that "*it could subscribe to the doctrine*" of *Taylor* v. *Dunbar, Cory* v. *Boylston Fire & Marine Insurance Co.*, and *Perry* v. *Cobb*, supra. Yet the opinion does not give any logical basis for distinguishing such cases which involved delays due to such perils of the sea as tempests, from other perils of the sea like collisions, as in *Pink* v. *Fleming*, L. R. 25 Q. B. D. 396 supra, or from stranding, as in the case at bar.

As there is manifestly no logical distinction between a peril of the sea such as a tempest, and a peril of the sea such as a stranding or collision, it is too early to say that the New York Courts are in conflict with the decisions elsewhere.

Manifestly the Court of Appeals of New York must:

(a) follow the rule of *Taylor* v. *Dunbar,* to which the Appellate Division professes to subscribe; or

(b) formulate some distinction not hitherto recognized between delays due to some perils of the sea such as tempests, and delays due to other perils of the sea such as collision or stranding (fault cannot be the criterion in the present case since none is alleged in the declaration); or

(c) limit the *Corsicana* to the facts there involved, where the ship was unable to complete her voyage in a practical sense and was forced to put into a port of refuge so that the continuity at least of the voyage was completely broken, and refuse to extend it to a case such as the case at bar, where, because of a stranding, the ship was delayed for a few hours but successfully overcame the sea peril and completed the voyage.

Until we know which course the New York Court will follow, it is not accurate to say that New York is in conflict with other jurisdictions. Still less can the petitioner on the slender basis of the doubtful position of this one American court, sustain its assumption that there is an "American Rule" which conflicts with the English rule.

IV.

Petitioner attempts in the fourth reason assigned for the granting of the writ, to stress the supposed importance of the question presented, as well as the alleged conflict of decisions which have been dealt with above.

That the matter is not one of general importance is clear from the following:

(a) The parties in the case at bar have themselves placed a construction upon the policy, which determines the question on the facts of this *particular* case (*Insurance Co.* v. *Dutcher,* 95 U. S. 269, 273; *Williston on Contracts,* Revised Ed., Sec. 623); and the question is not, therefore, of general importance. The policy in the general coverage clause insured against "sea perils", but excluded in a printed memorandum clause, *partial* loss to fruit (R. 8). This, in turn, however, was modified by the typewritten provision (R. 12),—"Warranted free from particular average unless the vessel * * * be stranded".

The effect of this last clause was enlarged later to *specifically* include *delay damage* by a separate rider, which is contained in Exhibit A to Respondent's plea (R.19), at an increased premium. This rider containing *specific* coverage for delay damage was canceled before the loss here involved, and the premium reduced from 60¢ to 25¢ (R. 17). In the case of a partial loss, therefore, it is quite clear that the parties did not intend to cover liability for delay damage in the case of a *stranding,* excepting when they specifically contracted for such delay damage at an additional premium. Manifestly, therefore, since the word "stranding" alone was not interpreted by these parties to include deterioration of the fruit due to *delay* from stranding in the case of a *partial* loss, in like manner

they did not mean to include such delay damage in case of a *total* loss. Stranding (which is included in the term perils of the sea) must mean the same thing in the general coverage clause that it means in the partial loss clause.

To conclude upon this point, it is quite clear that the question which the petitioner attempts to present to this Court is confused by the existence of facts which show an interpretation of the policy by the parties and prevent the question of general interpretation from being squarely presented.

(b) Another reason why the question presented in this petition is not one of general importance, is that the case is concerned with an insurance policy into which the petitioner is attempting to read a meaning which, had it been intended, could have been clearly, easily and readily expressed by the parties.

In fact, as has just been pointed out, an intent to cover delay damage was clearly expressed in this very case by the parties when they wished to include delay damage due to a partial loss (R. 19). This accords with a general custom in the insurance business to *specifically* cover delay damage by riders where such is the intention.

Winter on Marine Insurance, 2d Ed., p. 97, says:

> "It is *usual* in some trades, such as the importation of fresh fruit, *specifically* to cover loss or deterioration resulting from prolongation of the voyage due to breakdown of the propelling machinery, rudder trouble, or other named causes * * *" (Italics ours.)

This last edition was written after the decision in the *Corsicana* (supra), showing that this decision has never been accepted as establishing the position of the peti-

tioner, or as having made it unnecessary to say so specifically if it is intended to cover the deterioration of a perishable cargo from delay. Surely there is no question of importance involved in attempting to define by decision the meaning of words in a contract which the parties can (and did when they wanted to) make clear themselves by appropriate language.

Dated May 29, 1937.

Respectfully submitted,

D. ROGER ENGLAR,

FRANK B. OBER,

Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM 1937.

No. 57.

LANASA FRUIT STEAMSHIP & IMPORTING COMPANY, INC.,

Petitioner,

—against—

UNIVERSAL INSURANCE COMPANY.

RESPONDENT'S BRIEF.

D. ROGER ENGLAR,
FRANK B. OBER,
MARTIN DETELS,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 57.

LANASA FRUIT STEAMSHIP & IMPORTING COMPANY, INC.,

Petitioner,

—against—

UNIVERSAL INSURANCE COMPANY.

RESPONDENT'S BRIEF.

Statement.

This case comes before this Court on a writ of certiorari granted to review the judgment and order of the United States Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court of the United States for the District of Maryland. The judgment of the District Court in favor of the respondent (defendant below) was entered on the pleadings.

The effect of the demurrer to the pleas in this case is to raise two questions—first, as to the sufficiency of the declaration under the principle that a demurrer raises the question of the sufficiency of the first pleading, and second, as to the sufficiency of the third plea as a bar to the action.

The right of the petitioner to recover necessarily depends upon the sufficiency of the following allegations of the declaration (R. 2):

> "the plaintiff (petitioner) was the owner of the cargo of bananas aboard the Norwegian steamship 'Smaragd' which cargo was insured by the defendant (respondent) under the policy aforesaid, and while said vessel was proceeding up the Chesapeake Bay to Baltimore on the 21st day of July 1935, and while said policy was in full force and effect, the said steamship 'Smaragd' went aground and stranded off Seven Foot Knoll in the Chesapeake Bay, and before she could be floated the entire cargo of bananas thereon became over ripe and rotted, causing a total loss of said cargo of bananas to the plaintiff, which loss was due to a cause insured against under said policy;"

The judgment on the demurrer in favor of the respondent was final, as the petitioner elected to stand on the pleadings as presented to the District Court, though offered an opportunity to enlarge and modify the Record.*

---

* NOTE: After the District Court delivered its opinion overruling the petitioner's demurrer, a colloquy took place between Court and counsel, which concluded as follows (R. 22, 23):

> "Mr. Wortche: I assume, if we went to trial with the case and this rider was put in evidence, which your Honor unquestionably would let in, you would grant a prayer taking the case from the jury, would you not?
>
> The Court: Yes. You can have an opportunity to file a stipulation with any additional pleading which will put the matter in proper shape to take an appeal. That can be a matter of understanding between the parties. As far as the Court is concerned, I understand the matter is conclusive.
>
> (Hearing closed.)"

The question presented on this appeal is stated by the petitioner as follows:

"QUESTION INVOLVED.

The question involved is: Does the general clause of the marine cargo insurance policy, insuring for loss caused by perils of the sea, cover a loss where a marine peril, viz: stranding, has so delayed the voyage that the cargo has become a total loss?" (Petition, p. 6).

As a statement of the question in very general terms, the foregoing is correct. It should be considered, however, in connection with certain of the facts on which it arises.

Thus, in the present case, the cargo was a highly perishable cargo. It is not suggested that the cargo suffered any damage excepting as a result of its own inherent vice. So far as appears, the loss occurred during a very short period of delay. The vessel was merely delayed, she was not damaged; and at no time was it necessary for the vessel to put into a port of distress or otherwise depart from the course of her intended voyage.

Furthermore, it appears from the record that the conduct of the parties themselves furnishes a clear indication of the interpretation which they placed upon the policy. If there is any doubt as to the meaning of the policy, the actual intent of the parties would seem to be controlling.

The evidence of actual intention is presented by the third plea (R., p. 13, Petition, pp. 3-5). This plea alleges that the parties, by an endorsement, for an increased premium, *specifically* covered decay of fruit in consequence of delay; and that this endorsement

was canceled prior to the loss, thus indicating a construction by the parties that the contract without such endorsement was not intended to cover loss by decay due to delay.

POINT I.

The only issue presented to the Court in this case is a question of law on which there is no conflict of authority, namely, the question whether deterioration of perishable cargo due to inherent vice while the vessel is merely delayed by sea perils, is covered by a policy which insures against sea perils but not specifically against delay.

By reason of the fact that this case comes up on the pleadings, it presents a pure question of law. The question before this Court is whether the facts stated in the declaration entitled the petitioner to recover under the policy of insurance attached to the declaration. There is no allegation that the vessel was damaged or rendered incapable of continuing and completing her voyage, or that she did not in fact complete her voyage. The only effect attributed to the stranding was delay, and there is no allegation even as to the extent of the delay.

The cargo was one of the most perishable which is ever carried. Even if it be assumed (in the absence of any allegation to that effect) that the bananas were shipped in sound condition and would have been merchantable at the end of a normal voyage, the fact still remains that both the pleadings and the nature of the cargo are consistent with the assumption that a very brief delay would and did render them worthless.

If the petitioner can recover on the declaration filed in this case, then every assured can recover under a marine policy for deterioration which takes place during a delay of one or two days due to fog or heavy weather; or while a vessel lies aground until the next high tide, a period of twelve hours or less. We stress this aspect of the case because we think it controls the precise limits of the issue before this Court.

For the reasons above stated, we submit that this Court can only reverse the decision below by holding that if a vessel is delayed by a sea peril, for however short a period, and during the delay a perishable cargo becomes worthless solely because of its own inherent vice, the loss is recoverable under the common form of marine insurance policy, without any express coverage against losses due to delay. There is no authority either in England or the United States, in support of such a decision. There is ample authority to the contrary (*infra*, pp. 9 *et seq.*).

While some inconsistencies may be found in the language of the opinions, we submit that the decisions themselves all recognize and conform to certain broad principles which dispose of the present case. These principles may be stated as follows:

1. Deterioration of perishable cargo caused through inherent vice while the vessel is delayed by a sea peril is not, without more, covered under a marine policy which does not expressly insure against such deterioration.

2. In order to recover for such deterioration, it must be shown that the adventure was not merely delayed but frustrated by reason of the vessel's forced departure from the course of her

> voyage. We have found no decision which allowed recovery of such damage in the absence of proof that the vessel had put into a port of distress and remained there for a period which constituted a virtual abandonment or frustration of the voyage.

We submit, therefore, that the question before the Court in the present case is not whether to follow English or American authorities. The question is whether this Court shall adopt a rule contrary to all existing authorities on this subject.

The case upon which the petitioner most strongly relies is *Brandyce et al.* v. *United States Lloyds, Inc.*, 207 App. Div. 665. In that case the vessel was so damaged by collision that she was obliged to put into a port of distress and discharge her cargo in order to make repairs. Owing to the perishable nature of the cargo, it was impracticable to hold it until the vessel was repaired and then reload it for carriage to destination. Accordingly, the cargo was sold and the voyage was broken up in the port of distress. The case therefore falls squarely within the second class above described. The *Brandyce* case was affirmed without opinion by the Court of Appeals of the State of New York (239 N. Y. 573). Accordingly, the basis of the decision must be sought in the opinion of the Appellate Division. We quote as follows from that opinion (at p. 667):

> "Mere delay on the voyage, as a result of which *cargo* is spoiled or damaged, is not a ground for recovery. This is exemplified by the leading case of *Taylor* v. *Dunbar* (*supra*), cited by the defendant, in which the delay was caused by tempestuous weather and in which Montague Smith,

> *J.*, said: 'The loss here has arisen in consequence of the putrefaction of the meat from the voyage having been unusually protracted. *That is a loss which does not fall within any of the perils enumerated in this policy.* To render the underwriters liable, it must be shown that the loss is proximately due to one of the known perils. *Retardation or delay of the voyage is not one of them.' The Alps* (L. R. (1893) P. D. 109, 116), also cited by the defendant, belongs to this class of cases. In *Pink* v. *Fleming* (L. R. 25 Q. B. Div. 396), however, the question presented appears to have been squarely passed upon. As a result of a collision a portion of a *cargo* of oranges and lemons was temporarily discharged into lighters, and later reloaded and the voyage continued. Upon arrival at destination it was discovered that some of the fruit was decayed, due partly to delay and partly to handling. It was held that the *delay* and not the *collision* was the proximate cause of the loss, the court saying: 'According to the *English* law of marine insurance only the *last* cause can be regarded. * * * With regard to the American authorities, the American law on the subject seems to *differ materially from our law*, and therefore, it is not necessary to consider them.' ''*

The foregoing quotation plainly shows that the Appellate Division fully accepted the principle that deterioration resulting from mere delay on the voyage is not a ground of recovery. The court clearly distinguishes between a case of mere delay (*Taylor* v. *Dunbar*) and a case where the vessel puts into a port of distress and the cargo is damaged by the treatment which it receives there (*Pink* v. *Fleming*).

---

* The italics in this quotation appear in the original report but the italics elsewhere throughout the brief are ours.

There is a suggestion in petitioner's brief that a distinction may be drawn between storms and other perils of the sea. Indeed, the petitioner goes so far as to state that storms are not perils of the sea. Naturally, no authority is cited for this extraordinary proposition. The authorities to the contrary are so numerous that we shall merely cite some of the text book authorities:

> Phillips on Insurance, 5th ed. Vol. 1, sec. 1099;
>
> Arnould on Marine Insurance, 11th ed. Vol. 2, sec. 812, 813;
>
> Winter on Marine Insurance, 2d. ed. p. 155.

We think it is plain that the decision in *The Brandyce* case did not turn on any distinction between storms and other sea perils. In stating the question presented, the court said (at p. 666):

> "The precise question presented by this submission relates to whether loss by natural deterioration, during a delay in the voyage caused by a sea peril, is a loss by sea perils within the meaning and intent of the policy of insurance."

The court then went on to discuss the authorities, among which it cites with approval two cases where the peril encountered was a storm. In *Taylor* v. *Dunbar,* the storm merely prolonged the voyage; in *Williams* v. *Smith* the storm made it necessary for the vessel to put into a port of distress where the voyage was broken up. The fact that the court in the *Brandyce* case approved both of these decisions the first of which exonerated the underwriters, while the second held them liable shows clearly that the distinction which it drew was not between storms and other sea perils, but between storms which merely cause delay and storms which make it necessary for a ves-

sel to put into a port of distress and abandon the voyage.

Both in principle and on precedent, there is a wide distinction between a case where the voyage is broken up or temporarily abandoned while the vessel puts into a port of distress and discharges her cargo, and a case where a vessel is merely delayed in the prosecution of her voyage.

The question just where the line should be drawn between losses due to delay and losses due to sea perils which incidentally cause delay, is interesting and not without difficulty. We shall proceed to analyze the various decisions which must be considered in formulating a general rule on this subject. For the reasons above stated, however, we think it is clear that the present case involves only one very narrow question of law upon which there has never been any conflict of authority.

(a) Marine Insurance covers loss by sea perils. It does not cover loss from inherent vice of the goods; nor does it guarantee the maintenance by the vessel of any particular speed or schedule.

The following authorities support the opinion of the Circuit Court of Appeals:

American authorities:

Cory v. *Boylston Fire & Marine Insurance Co.*, 107 Mass. 140;
Perry v. *Cobb*, 88 Maine 435;
Bond v. *The Superb*, 1 Wall. Jr., 355, 3 Fed. Cas. 1624;
The Casey (D. C. N. Y.), 39 F. (2d) 136;
1 Phillips on Insurance, Secs. 1089, 1134;
Jordan v. *Warren Insurance Co.*, 1 Story 342, 352;
38 C. J. 1097;

Winter on Marine Insurance, 2nd ed., page 97.

English authorities:

Taylor v. *Dunbar,* L. R. 4 C. P. 206; 38 L. J. C. P. 178; 17 W. R. 382;
Pink v. *Fleming,* L. R. 25, Q. B. D. 396;
Arnould on Marine Insurance, 11th ed. Vol. 2, Sec. 778;
17 (Halsbury) Laws of England, Sec. 859;
Marine Insurance Act of 1906, Sec. 55 (2) (b).

That ships, because of the action of the elements, can not maintain such precise schedules as obtain in land transportation is obvious. The dates of arrival in the days of sailing ships could not be predicted with accuracy within weeks. While the introduction of steam has greatly shortened the duration of voyages, it has not overcome the uncertainties inherent in marine transportation. While delays due to sea perils have been reduced from weeks to days, and it has thus become possible to transport such perishable fruit as bananas, it is still by no means uncommon for ships to encounter delays which will be fatal to such perishable goods. Delays due to heavy weather, deviation to avoid danger or to render aid to ships in distress, quarantine regulations and temporary breakdowns of machinery are constantly reported in the daily press.

For hundreds of years marine insurance has been written on the basis that the underwriter does not insure that the voyage will be completed within any particular time. This is inherent in the very nature of

marine risks. As Mr. Justice Story, sitting in Circuit, said in *Jordan* v. *Warren Insurance Co.*, 1 Story 342, at page 352:

> "But the underwriters take upon themselves no risk whatsoever as to the length or duration of the voyage insured. What they undertake is that, *notwithstanding any of the perils insured against*, the ship shall be capable of performing the voyage so as to earn the freight insured; not that the voyage shall be performed in a longer or shorter period. The owner takes upon himself the chances of a short, or of a protracted voyage."

From this principle inevitably follows the elementary rule that the underwriter is not liable for loss due to inherent vice of the goods.

Arnould on Marine Insurance, 11th ed. Vol. 2, Sec. 778:

> "Upon the same ground the underwriter is not liable for that loss or deterioriation which arises solely from a principle of decay or corruption inherent in the subject insured, or as the phrase is, from its proper vice; as when fruit becomes rotten, or flour heats, or wine turns sour, not from external damage, but entirely from internal decomposition."

Phillips on Insurance, Vol. 1, Sec. 1089:

> "From the enumeration already given of the perils usually insured against, it appears that the insurers undertake to make indemnity only for damage arising from external accidents, not for that occasioned by the qualities or defects of the things insured. Policies contain a provision that

the insurers shall not be liable for any loss upon certain enumerated articles, unless it amounts to a certain rate per cent. The articles to which this provision relates are those most subject to damage and decay from their internal qualities. But independently of this provision, it is a general rule that the insurers are not, under the common form of the policy, liable for any damage or loss arising from the qualities or defects of the subject insured, since these are not among the perils assumed by the underwriter."

Sec. 1134:

"Thus, under a policy in the ordinary form, the assured must bear the loss arising from the qualities of the article insured, without any direct action of the perils insured against, as those of the sea or others, upon the specific subject of the contract. Accordingly, where a vessel was compelled by sea-damage to put into Martinique to repair, for which purpose it was necessary to discharge the cargo, a part of which consisted of porter and claret, which were liable to be spoiled by the heat of the climate, were necessarily sold. The loss was held not to be such a consequence of the perils of the seas, by which the vessel had been damaged, as to render the insurers of these articles liable for the loss. The loss arose from the action of the climate on the articles, and as this was a damage at the risk of the assured, he was not the less liable for it because it had been indirectly and incidentally aggravated by the delay occasioned by the perils of the seas which were insured against."

38 C. J. 1097:

"Insurer in general takes no risk with regard to the length or retardation of the voyage by the

perils insured against, nor to its interruption, if it is resumed or capable of being resumed; as in the case of an embargo, or where the master is detained in port by a prosecution against him for a supposed violation of law, or where he remains to prosecute a suit for collision, or where a cargo insured is sunk and raised uninjured after considerable delay and is sold for a less price owing to the delay, or where a cargo of meat, fruit, or other perishable goods is injured by the delay, or a collision causes delay for repairs."

In Winter on Marine Insurance, 2nd Ed., p. 97, the author states:

"Given the proper conditions of heat and moisture, bacterial action will commence in any animal or vegetable product. Unless such action is caused directly by an outside force, against whose action insurance is provided under the policy, the underwriter is not liable for the resultant damage. For this reason, deterioration of a commodity, due solely to delay or prolongation of transit, is not covered under a marine insurance policy in its ordinary form. It is usual in some trades, such as the importation of fresh fruit, *specifically* to cover loss or deterioration resulting from prolongation of the voyage due to breakdown of the propelling machinery, rudder trouble, or other named causes, provided the prolongation equals or exceeds an agreed number of days."

In the banana trade particularly, a few days, or even a few hours delay may spoil the fruit. Its safe arrival depends upon the manner in which it is stowed; whether it is hot or cold weather; upon the weather permitting the hatches to be kept open; upon

the direction of the wind, which may add to or destroy the efficiency of the ventilators. These factors are just as important as the length of the voyage, which may be shorter or longer depending upon sea perils encountered. Even when carried on a refrigerated vessel, a cargo of bananas may suffer serious deterioration in the course of an ordinary voyage, without any fault on the part of the carrier, if any of the surrounding conditions are unfavorable. *The "Heranger", Otis, McAllister & Co.* v. *Norwegian Motorship Heranger and Westfal-Larsen & Co.,* U. S. D. C., N. D. Calif., October 15, 1937, 1937 American Maritime Cases 1314. In other words, the risk of unpreventable spoiling is one of the ordinary risks of this business, and the mere fact that the cargo in this case spoiled in no way indicates that there was any intention of insuring against this loss. Whether the risk in this case was within the coverage depends, of course, upon the policy itself as explained by the rider elsewhere discussed. As Mr. Justice Story pointed out in the case above cited (*Jordan* v. *Warren Ins. Co.,* 1 Story 342, p. 352), the underwriters do not insure the duration of the voyage, but merely that the vessel will be able to complete it. If the damage in this case had been directly due to a sea peril, that is, if the ship had sunk or burned or the cargo had been destroyed by the entry of sea water, the underwriter would unquestionably be liable, but where the cargo suffers no physical damage through any peril of the sea there is no liability.

Taylor v. *Dunbar,* L. R. 4 C. P. 206; 38 L. J. C. P. 178; 17 W. R. 382.

In this case a cargo of meat was shipped from Hamburg for London. The vessel was delayed on

her voyage by tempestuous weather and the cargo, solely by reason of such delay, became putrid and had to be thrown overboard at sea. The cargo was covered under an ordinary policy of marine insurance, which insured (in language identical with the coverage in the case at bar) against——

> "perils of the seas * * * and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods * * * (p. 206)."

The Court held that the underwriters were not liable.

Keating, *J.*, said:

> "The facts stated in the case show beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of the voyage. That delay was occasioned by tempestuous weather; but no case that I am aware of has held that a loss by the unexpected duration of the voyage, though that be caused by perils of the sea, entitles the assured to recover upon a policy like this. I think we should be establishing a dangerous precedent if we were to give effect to Mr. Beasley's argument, seeing that there are so many cargoes which are necessarily affected by the voyage being delayed. I am not disposed to create such a precedent."

Montague Smith, *J.*, said:

> "I am of the same opinion. The loss here has arisen in consequence of the putrefaction of the meat from the voyage having been unusually protracted. That is a loss which does not fall within any of the perils enumerated in this pol-

> icy. To render the underwriters liable, it must be shewn that the loss is proximately due to one of the known perils. Retardation or delay of the voyage is not one of them. * * * If we were to hold that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea, we should be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods, but in the case of goods of all other descriptions. By the common understanding both of assured and assurers, delay in the voyage has never been considered as covered by a policy like this."

Brett, *J.*, said:

> "I am also of opinion that damage to goods caused by delay of the voyage, though the consequence of stormy and tempestuous weather, is not one of the perils covered by an ordinary policy. Such damage must have occurred many times, and yet no trace is to be found of such a claim being maintained."

The above case is cited and recognized as the law of both England and America.

> Arnould on Marine Insurance, 11th ed. Vol. 2, Sec. 778;
> 17 Halsbury, Laws of England, Sec. 859;
> *Pink* v. *Fleming,* L. R. 25, Q. B. D. 396 (*infra*);
> *The Alps,* L. R. (1893), Probate Div. p. 109, at p. 116;
> *Reischer* v. *Borwick* (1894), 2 Q. B. 548;
> *Inman S. S. Co. Ltd.* v. *Bischoff,* L. R. 7 A. C. 670, at p. 676;

Perry v. *Cobb,* 88 Maine 435, at p. 448;
Cory v. *Boylston F. and M. Insurance Co.,* 107 Mass. 140, at p. 145.

In *Pink* v. *Fleming,* L. R. 25 Q. B. D. 396, goods were insured under the ordinary form of Lloyd's policy. The ship in which the goods were laden was in collision with another ship and thereby sustained damage which rendered it necessary for her to put into a port for repairs. In order to make the repairs it was necessary to discharge a portion of the insured goods, consisting of oranges and lemons, into lighters where they remained until the repairs were effected. When the ship arrived at destination a portion of the fruit had deteriorated. Nevertheless it was held that the underwriters were not liable for the deterioration.

Bowen, *L. J.,* said:

> "Whether we consider the damage occasioned by delay or that occasioned by the handling of the fruit, the same principle appears to apply. The proximate cause of the loss was not the collision or any peril of the sea. It was the perishable character of the articles combined with the handling in the one case, and the delay in the other."

The petitioner admits in its brief (p. 20) that *Taylor* v. *Dunbar, supra,* and *Pink* v. *Fleming, supra,* represent the law of England. Nevertheless, in other parts of its brief, it attempts to question the authority of these cases. We have already pointed out that *Taylor* v. *Dunbar* is unquestioned law, both in England and in this country. *Pink* v. *Fleming*

is cited by all the authorities as still being English law.

17 Halsbury Laws of England, Sec. 859.

This section of Halsbury based upon *Pink* v. *Fleming* states:

> "As already stated, unless the policy otherwise provides, the insurer on ships or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against. From this it follows that the underwriter is not liable for damage to perishable goods, although such damage would not have arisen but for a prolongation of the voyage caused by a peril insured against."

It is true that in one of the several judgments in *Pink* v. *Fleming,* Lord Esher said:

> "The case of *Taylor* v. *Dunbar* seems to me to have been decided upon substantially the same view as that which I have endeavoured in somewhat different terms to state, and it appears to me, to be really an express authority in favour of our decision. With regard to the American authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them (p. 398)."

The first sentence in this passage shows the basis of Lord Esher's concurrence, but the petitioner relies upon the last sentence, which was also referred to in the *Brandyce* case, *supra,* as indicating that the English Court, *i. e.,* one of the judges, thought that the American authorities were different. Lord Esher did not state what American authorities he had in mind. He could not have been referring to any

American authorities differing from *Taylor* v. *Dunbar,* which he had just cited in this quotation, for the American authorities unanimously support it. Presumably he was referring to some cases that must have been cited on the *general* law of proximate causation, which counsel thought might require a different result. There are one or two parts in Lord Esher's opinion on proximate cause which went beyond the requirements of the case, and are not even law in England (Arnould on Marine Insurance, 11th ed., Sec. 783, note r.), and no doubt he had been pressed by American authorities on causation, which indicated that these particular remarks were not law here either. But the fact that a dictum of one of the judges in this case on the subject of causation has been discredited does not weaken the strength of the decision, for not only does it logically follow from *Taylor* v. *Dunbar,* the authority of which has never been impeached, but it has been codified in the Marine Insurance Act of 1906.* Subdivision 2(b), Section 55 of that Act reads as follows:

> "Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against."

The Marine Insurance Act of 1906 is set forth in Arnould on Marine Insurance, 11th ed., as Appendix

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* NOTE: The petitioner's comparison between the English Marine Insurance Act of 1906 (referred to by petitioner as the British Merchant Marine Act) and the American Merchant Marine Act of 1920 (Petitioner's Brief, p. 12) is obviously based upon a misapprehension as to the nature of the English Act. The Marine Insurance Act of 1906, as its name implies, relates solely to the subject of marine insurance, whereas the American Act of 1920 applies to the regulation of shipping generally.

A. This Act was, of course, intended to be a codification of the preexisting law.

17 Halsbury Laws of England, Sec. 859, note (h).

Actually, Lord Esher confused the issue, which is not one of causation, but of coverage, which depends on contractual intent. Many conditions permit the inherent vice of the goods to come into operation, such as hot weather, bad stowage, bad ventilation or mere lapse of time from any cause, whether due to sea peril or not. Manifestly, the question whether such a condition can be regarded as a "proximate cause" of loss or not, is of little importance in determining whether the contract is an insurance against such a condition. The question is solely one of contractual interpretation. Does the contract insure against *delay* from stranding or against *damage* from stranding? As shown by all the authorities, normally marine insurance covers damage only, not delay.

Nor is there any conflict, as argued by petitioner, between the decision appealed from in this case and the case of *Leyland Shipping Company* v. *Norwich Union Fire Ins. Soc.* (1918) L. R. App. Cas. 350, which involved only the question whether the loss of a torpedoed ship, which actually *sank,* after some subsequent intervening causes, was caused by a war peril—a pure question of causation. If the ship in the case at bar had sunk later because of strain resulting from the stranding, instead of arriving safely in port, the cases would have been parallel. Cases involving proximate causation as between sea perils and war perils have no bearing on the question whether the *coverage* of a marine policy includes deterioration from inherent vice.

That deterioration during delay, even where the delay is caused by sea perils, is not within the coverage of a marine policy has been also established by the following American cases:

Cory v. *Boylston Insurance Co.*, 107 Mass. 140.

This was a suit on a policy covering a shipment of champagne. The vessel encountered severe storms, resulting in a great delay in the voyage, and part of the shipment was damaged by sea water. A further part was spoiled or leaked out. As to the latter damage, the Court, through Mr. Justice Gray, said:

> "By the general law of insurance, underwriters against perils of the sea and other usual perils do not assume the risk of ordinary perils incident to the course of the voyage, nor of damage arising from intrinsic qualities or defects of the thing insured, including waste from ordinary leakage of liquors" (p. 144).
>
> * * * * * * *
>
> "Independently of the peculiar provisions of this policy, underwriters are not liable for injury to goods by the ordinary dampness of the hold, though aggravated *by the length of the voyage and the variety of climate through which the vessel has passed in consequence of perils of the sea,* because such injury is still, if those perils do not otherwise operate upon the goods, attributable to the nature of the goods themselves and not to the perils of the sea, as the proximate and efficient cause; * * *" (citing *Taylor* v. *Dunbar,* among other cases).
>
> * * * * * * *
>
> "In *Baker* v. *Manufacturers' Ins. Co.*, 12 Gray 603, decided by this Court in 1851, the facts curiously resembled those in the present case. The

policy was upon delicate French goods on a voyage from Havre to Boston. The vessel had an extraordinarily long passage, and met with repeated gales and stormy weather, which drove her south of her usual course, and caused her to ship heavy seas, and to strain and open her seams, but not to leak much. Upon examination of the cargo after arrival, many of the cases appeared to have been wet with salt water; some cases were damp in which there was no indication of salt water, and in some of these the goods were as much damaged as in those that appeared to have been wet; there appeared to be no difference in the nature of the damage, which consisted of discoloration and mould; and some of the witnesses were unable to determine how many of those cases the contents of which were damaged had been wet with salt water. It was held, that the insurers were liable for the damage to the goods, occasioned by their being wet with salt water; that they were not liable for any damage from the ordinary dampness of the hold, though aggravated by the length and circumstances of the voyage * * *'' (pp. 145-6).

This case has been cited with approval by the Circuit Court of Appeals for the Third Circuit in the case of *American Merchant Marine Insurance Co.* v. *Liberty S. & G. Co.*, 282 Fed. Rep. 514, at page 520.

Perry v. *Cobb*, 88 Maine 435.

This was an action on a policy of marine insurance on a shipment of lime. The vessel had encountered unusually severe weather and the lime had suffered some damage by sea water, but the amount of this loss was less than the franchise. Claim was made for deterioration of the lime and containers due to the

unusual length of the voyage resulting from sea perils. The Court held that this damage was not recoverable, saying:

> "If the goods be of a perishable nature, and decay from a protracted voyage before they can be landed, the loss would not be from a peril of the sea * * *" (p. 446).
>
> "The general rule is that everything which happens through the inherent vice of the thing * * * shall not be reputed a peril, if not otherwise borne on the policy. * * * *If the inherent vice be stimulated by a protracted voyage it is still no loss from a peril of the sea. Cory* v. *Boylston Ins. Co.*, 107 Mass. 140; *Taylor* v. *Dunbar*, L. R. 4 C. P. 206" (pp. 447-8).

Martin v. *Salem Marine Insurance Co.*, 2 Mass. 420, 429.

Here the defendant insured the hull and cargo of a schooner against various marine perils, including restraints of Princes: The schooner was held by a French cruiser for two months in an African port, and the assured claimed, among other things, for the damage done to the hull by worms during and because of such detention. The Court held that there could be no recovery because "the loss was like the wearing and natural decay of a vessel, and not by perils of the sea".

Bond v. *The Superb*, 3 Fed. Cas., p. 845.

In this case Circuit Justice Grier held:

> "Where goods are liable to loss or deterioration which arises solely from an inherent principle of decay or corruption, the owner cannot

claim for general average, notwithstanding the delay of the vessel in the port of necessity, may have added greatly to that deterioration. * * *

"* * * *No direct injury was received by the fruit in consequence of unloading and reloading it.* * * * *Now, if the mere delay which would undoubtedly increase the damage of these perishable articles when it had once commenced, is no reason why the damage whose immediate cause is the vice proper, should not be brought into general average, we can see no reason why the removal which may have increased and not caused the injury, should have a different doctrine applied to it.* * * *"

In *The Casey*, 39 Fed. (2d) 136, the District Court for the Southern District of New York held that loss from a decay of figs during delay at a port of necessity was not recoverable in general average, saying "all men know that delay does not cause decay, although it may be the occasion owing to which decay occurs."

Cases dealing with the liability of carriers are of course irrelevant in the present case. The question of fault or negligence has no bearing on the issue here, which turns on the interpretation of the contract of insurance.

(b) All of the cases relied on by the petitioner are readily distinguishable. The cases where marine underwriters have been held liable for deterioration of cargo by reason of delay are all cases which involve vessels putting into a port of distress and remaining there for a period constituting a frustration or virtual abandonment of the voyage and not merely a brief delay due to sea perils.

The following are the principal authorities relied on by the petitioner:

Brandyce et al. v. *U. S. Lloyds, Inc.*, 207 App. Div. 665, affd. 239 N. Y. 573;

Tudor v. *New England Insurance Co.*, 12 Cush. (Mass.) 554;
Magoun v. *New England Marine Ins. Co.*, 1 Story 157, 16 Fed. Cas. 483;
Brown v. *St. Nicholas Ins. Co.*, 61 N. Y. 332;
Providence Wash. Ins. Co. v. *Adler*, 65 Md. 162, 4 Atl. 121;
Musgrave v. *Mannheim Ins. Co.*, 32 Nova Scotia Reports 405;
Rodocanachi v. *Elliott*, L. R. 9 C. P. 518;
Williams v. *Smith*, 2 Caines 1, 2 American Decisions 209;
Fireman's Fund Ins. Co. v. *Trojan Powder Co.*, 253 Fed. 305.

We have already pointed out that the *Brandyce* case fully accepted the general principle that deterioration which occurs during mere delay caused by sea perils, is not recoverable as a loss caused by perils of the sea.

In the *Tudor* case, the vessel sprang a leak, her cargo was damaged by sea water, and, it became necessary for her to put into a port of refuge and discharge her cargo. The vessel was so badly damaged that she was sold and the voyage abandoned at the port of refuge. Moreover, any argument that the reasoning of that case could be applied to this, despite the difference in facts, is answered by the later Massachusetts case of *Cory* v. *Boylston*, 107 Mass. 140, *supra*.

The *Magoun* case involved insurance on the vessel and freight, but not on the cargo. The vessel was seized and detained by the local authorities at the port of loading for four months, and Mr. Justice Story said:

"The vessel was never delivered from that

peril until she was virtually destroyed and unable to perform the voyage."

There is, of course, no comparison between a vessel and a perishable cargo such as bananas. Moreover the voyage was clearly frustrated in the *Magoun* case, because the vessel was rendered permanently incapable of pursuing it.

The *Brown* case did not involve perishable cargo or any question of inherent vice. In that case the cargo of hay became a total loss when the canal boat carrying it broke in two and sank after having been blown ashore by a gale. There was some suggestion that the cargo might have been saved if ice had not formed around the barge and prevented the tugs from reaching her; but the case is so clearly distinguishable that the sole significance, if any, to be attached to it arises from the fact that the petitioner had to go so far afield to find authority which, by inference however remote, might be cited as contrary to the opinions held by the four judges who considered and decided the present case in the courts below.

Providence Washington Insurance Co. v. *Adler,* 65 Md. 162, which, incidentally, was decided in favor of the insurance company, is also readily distinguishable upon petitioner's own statement (Brief in Support of Petition, pp. 31-32).

The Nova Scotia case (*Musgrave* v. *Mannheim Insurance Co., supra*), like the *Magoun* case, involved freight insurance, *i. e.*, insurance on the earning power of the vessel, which can never sustain direct damage from sea peril. Moreover, in that case the voyage was broken up when the vessel, rendered helpless by a heavy gale, was towed into a port of

refuge where a large part of the cargo had to be discharged in order to make repairs.

In *Rodocanachi* v. *Elliott, supra,* the goods, which were not perishable, arrived in Paris by railroad and could not leave because of the German armies. The assured abandoned, claiming a loss by restraint of princes. The case did not involve any question of inherent vice or peril of the seas.

In *Williams* v. *Smith,* the voyage was broken up by a storm which caused the vessel to leak and compelled her to put into a port of distress, where a large part of the cargo was discharged in order to make repairs. The cargo consisted principally of naval stores, including tar in barrels, which is not generally considered as a perishable cargo; and the damage to it was caused in the first instance by the violence of the gale being merely aggravated by the climate at the port of distress during the delay there.

Fireman's Fund Insurance Co. v. *Trojan Powder Co.,* the Ninth Circuit case on which the petitioner relied in applying for certiorari, is perhaps the most remote of all the authorities cited by petitioner. That case held merely that where a vessel was prevented from completing her voyage by stranding, a cargo insurer whose policy contained an express agreement to pay forwarding charges was liable for the expense of forwarding, though the cargo itself was not damaged.

The five cases cited at page 2 of petitioner's brief dated October 30, 1937, are not in point. None of them involved any question of delay or inherent vice.

As appears from the foregoing review and analysis of petitioner's authorities, no case has been cited where underwriters have been held liable for deterioration resulting from delay, even though caused by sea perils, unless the vessel was driven into a port of distress and the voyage at least temporarily abandoned. We refer again to the principles stated at the outset of this brief (*supra*, p. 5), and assert with confidence that no case can be found either in England or the United States where recovery has been allowed upon a state of facts analogous to those alleged in the pleadings in the present case.

There is no force in the petitioner's argument (p. 12 of its brief) that the loss in this case is covered as a loss

> "which may reasonably be attributed to * * * collision or contact of the vessel * * * with any external substance (ice included) other than water * * *."

In the first place the language quoted is merely an exception to an exception,—*i. e.*, it is a provision that the warranty against particular average shall not apply to certain types of losses. It clearly was not intended to cover any new causes of loss which were not otherwise covered by the policy. An even more conclusive answer to this argument, however, is the fact that the case of the vessel being "stranded" is specifically dealt with earlier in the same sentence, so that the words "collision or contact * * * with any external substance" clearly cannot have been intended to include the risk of stranding.

(c) There is no support in the record for the petitioner's contention that the contract in suit was made in the State of New York, and even if that fact were established, it would not be controlling.

The petitioner and respondent are corporations of the States of Maryland and New Jersey, respectively. While the contract appears to have been countersigned in New York, the petitioner concedes that it was delivered in Maryland (Petitioner's Brief, p. 5), and the presumption is that it became effective there.

Even if the policy were a New York contract, however, this fact would not be controlling. It is well settled that in dealing with questions of general commercial law, the Federal courts are not bound by the decisions of the State courts.

> *Carpenter* v. *Providence Washington Ins. Co.*, 16 Peters (U. S.) 495, at page 511;
> *B & W Taxi Co.* v. *B & Y Taxi Co.*, 276 U. S. 518, at page 530.

See also cases cited by the Circuit Court of Appeals (R. 36). This rule applies with particular force to contracts of marine insurance. In *Aetna Insurance Co.* v. *Houston Oil & Transport Co.*, 49 F. (2d) 121 (C. C. A. 5), the Circuit Court of Appeals for the Fifth Circuit said:

> "We need not review the other decisions cited by appellee. Policies of marine insurance are governed by the General Admiralty Law. In construing them we prefer to follow the decisions of the Federal Courts and other Admiralty Courts and to put aside decisions of State Courts where they are in conflict.
>
> The policy covered the vessel on navigable waters of the United States without, as well as

within the State of Texas. It was a maritime contract and, therefore, governed by the General Admiralty Law and not by the law of Texas."

Indeed, this Court has pointed out the desirability of keeping the law of marine insurance uniform not only throughout the United States, but also as between the United States and England. *Queen Insurance Company* v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, at page 493.

POINT II.

The deliberate striking out in the policy of a provision specifically covering loss due to delay and the simultaneous reduction of the premium rate from 60c to 25c furnishes the strongest possible evidence that in this case the parties did not intend the policy to cover delay damage.

This point turns upon a fact not present in any of the authorities heretofore discussed. Hence this defense would be valid irrespective of any conclusion that may be reached on the other defenses, and irrespective of what construction might be given the policy had not the elimination by the parties of the delay damage rider clearly shown their intention to exclude delay damages.

The primary rule in the construction of a contract or policy of insurance is that the court must ascertain and give effect to the intention of the parties.

Therefore, the construction put upon an instrument by the parties is of great weight, and ordinarily is controlling.

In *Insurance Company* v. *Dutcher,* 95 U. S. 269, this Court said, page 273:

"The practical interpretation of an agreement

by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what the parties meant than to see what they have done."

Page on Contracts, Sec. 2034;
Williston on Contracts, Sec. 623;
22 Corpus Juris, 1178-80.

The record in this case clearly shows that the parties definitely intended to exclude delay damage.

The policy in the general coverage clause insured against sea perils, but in the *printed* memorandum clause (R. p. 6) excluded partial loss to fruit.

This was in turn modified by the *typewritten* provision—

"Warranted free from particular average unless the vessel or craft be stranded, sunk, burnt * * *" (R., p. 9).*

The effect of this clause is to exclude partial losses unless one of the specified events occurs on the voyage. If one of these events occurs, *e. g.*, if the vessel is stranded, the clause is nullified by its own terms, and there is no longer any distinction between a partial and total loss. Either is recoverable if caused by a sea peril; but neither is recoverable if due to inherent vice or any other cause not covered by the

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* NOTE: "Warranted", in this type of clause, means "agreed" or "stipulated". "Particular average" means "partial loss". The typewritten clause, therefore, means that the underwriter is to be liable for total losses and for general average claims, but not for partial losses, unless the vessel encounters one of the enumerated casualties, *i. e.*, stranding, sinking or burning (Winter on Marine Insurance, 2nd ed., pp. 190, 199, 213-214).

policy. The "F. P. A." (free of particular average) warranty does not add any new perils to those covered by the policy; it merely excludes certain types of losses which would otherwise be covered. Upon the actual facts of the present case, the F. P. A. warranty is, by its own terms, wholly inapplicable.

The clause above discussed, which was actually in force at the time of the stranding of the "Smaragd", is a standard clause promulgated by the Institute of London Underwriters.* Shortly before the voyage on which the stranding occurred, the parties had cancelled a very different clause which was drawn particularly with reference to fruit cargoes and was designed to give a greatly extended coverage in respect of such cargoes.

Some time after the policy became effective, namely, on April 4, 1934, in consideration of an increased premium (R. 13) a new rider was added, which for the first time specifically mentioned delay damage. The payment of the increased premium is alleged in the plea and admitted by demurrer. The added rider provided—

> "Free of particular average, unless the vessel be stranded, sunk, burned, on fire or in collision in any, all or several of which events the insurers are liable *for such loss by decay, injury or damage to the fruit, as is occasioned thereby, or occurs in consequence of* delay resulting therefrom * * *" (R. 15).

Subsequently and prior to the voyage in question, this rider was stricken out, and the premium rate on the policy was reduced from 60¢ to 25¢ (R. 13, 14).

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* NOTE: The Marine Insurance of Goods, by Frederick W. S. Poole, Appendix G, p. 383.

By this rider the underwriter specifically agreed for the *first* time to pay *delay* damage. This clearly shows that the parties never intended such a loss to be covered in the absence of the rider. It would have been a waste of money for the petitioner to pay an additional premium for this rider, if as it now claims it had already received precisely the same protection under the previous clause in the original policy quoted above. Hence, this rider supplied the coverage for a loss of fruit from *delay* during and after stranding, which had been theretofore lacking. But, as above pointed out, before this rider was added to the policy both partial and total losses of fruit in cases of stranding had precisely the same coverage against *delay* damage; that is, both were covered (as petitioner claims) or neither was covered, as we contend in Point I. There could not be a situation where one was covered and the other was not. Therefore, since the parties by this rider showed they never intended a partial loss of fruit due to a delay occasioned by a stranding to be covered in the absence of this rider (for otherwise the rider would have been a useless expense), it inevitably follows that no more did they intend a total loss of fruit resulting from a delay occasioned by or during a stranding to be covered in the absence of a similar rider specifically covering total loss due to delay occasioned by a stranding. On this point the Circuit Court of Appeals very properly said:

> "The argument advanced, at the hearing, that the rider was to cover partial losses is without point since under the policy without the rider plaintiff was insured against partial loss as well as against total loss caused by stranding, but, as we have seen, not against loss from delay incident to stranding" (R., p. 37).

Even if we were to concede for the purpose of the present argument that a marine policy would in the ordinary case cover a loss of perishable goods, resulting from delay (*i. e.* the proposition denied in the first point of this Brief), nevertheless, in spite of that general rule the parties to a marine insurance policy may certainly evidence an intention, while the policy is in force, that it is not to be interpreted as covering such a loss. If the parties evidence such intention then the policy will not cover such a loss, irrespective of what the general law on the subject may be. This rider specifically extending the coverage for loss of fruit to delay damage, for which an increased premium was paid, clearly shows that prior to the addition of this rider it was construed by the parties not to cover such damage, and the Circuit Court of Appeals so held (R. 37).

The petitioner indulges in several speculations as to why this rider was stricken out.

We do not, of course, know why the parties subsequently deleted this rider. Apparently, the insured was unwilling to pay the higher premium which was charged for delay damage, and for that reason this provision was struck from the policy. The important point is that the assured now *attempts to gain the advantage of such insurance without payment of the premium therefor.*

Petitioner contends that the rider was a reaffirmance of the general coverage clause, but if the petitioner found it necessary to pay a larger premium to obtain an interpretation of the general clause to coincide with its wishes as to coverage, surely its elimina-

tion and the reduction of premium amounted to a deliberate restriction of coverage.

Petitioner argues (Petitioner's Brief, p. 40) that the extra premium was largely for the part of the rider contained in the separate sentence and referred to as the breakdown clause. This argument has no discernible basis, and if the parties had this in mind surely they would have eliminated only the language relating to the breakdown clause and would have retained that part of the rider which dealt with delay damage, which their own actions had shown they considered necessary, even on their own theory, to amplify or at least to explain the general coverage clause. But it is absurd to think that the premium for breakdown delay alone would be more than the premium for all the other risks combined when, according to petitioner, the policy already covered several equally great risks of delay—*e. g.*, collision, stranding, fire, etc. Obviously the 25¢ rate was for marine perils only and the increase to the 60¢ rate must have been intended to cover *all delay* risks, not merely one delay risk.

Furthermore, this argument is effectively disposed of in the opinions of the two lower Courts.

The District Court rejected this argument in the following language:

> "It is true that this rider recited liability for damage directly due to some disasters, such as fire, which direct damage is covered by the clause in the policy hereinafter quoted upon which

plaintiff relies, but the reference to damage which is occasioned or occurs 'during or in consequence of delay resulting therefrom' as thus expressly provided for in the rider, is not referred to in any part of the policy in force at the time of the stranding. Therefore, to say that without this rider the policy nevertheless covers what this rider expressly covered, and for which coverage a higher premium was charged, is an argument which is not convincing."

Another effective answer to petitioner's argument is the well known fact that it is customary to include in marine policies covering fruit cargoes a clause specifically providing that the underwriter is to be liable for delay damage if the parties wish the policy to cover such damage (Winter—Marine Insurance, 2nd Ed., p. 97, quoted *supra*).

The petitioner endeavored to maintain the position in the District Court that this rider was not a part of the contract sued upon, and was, therefore, inadmissible in evidence, but appears to have abandoned this position. This argument is clearly unsound, as the striking out of words in a contract is most significant in determining the construction to be given to the remaining part of the contract.

In *Kinnear* v. *Adams, Inc.*, 142 Md. 305, the question before the Court was whether the tenant or the landlord was to be responsible for the care of water and gas pipes in the building. The written lease contained a provision that the tenant was to take care of the water and gas pipes, but this provision had been stricken out by having a pen line drawn through

it. The Court accepted this as conclusive evidence that the tenant was under no duty to take care of the water pipes.

The intention of the parties is always the principal canon of construction, and the customary interpretation of similar instruments is merely a secondary method of discovering intention. That language in an instrument having an established meaning may sometimes mean something quite different has been recognized by this Court in the case of *Thorington* v. *Smith*, 8 Wall. 1, in which, under the circumstances of the case, the common word "dollars" was determined to mean Confederate Dollars. See also

> 3 Williston on Contracts, Revised Edition, Secs. 623 and 630.

Therefore, whether, aside from the interpretation of the contract by the parties, delay damages are recoverable as claimed by the petitioner or are non-recoverable as contended by the respondent, at least in the case at bar the question has been answered by the parties themselves. Whatever the language meant to others, the parties in this case have shown a definite intent to exclude delay damage.

The Circuit Court of Appeals so held in the following language:

> "The fact that the rider, subsequently canceled, covering loss and damage from delay was affixed to the policy, shows that the parties placed the same interpretation upon the general coverage clause of the policy which we have placed upon it, and that plaintiff was willing to pay an additional premium greater than the original premium for protection against such loss and

damage. Plaintiff argues that the rider embraced causes for delay in addition to the marine perils against which the policy insured. This is true, but the fact that the rider covered also loss due to delay from those perils is strong proof that the parties did not interpret the policy without the rider as covering such loss. The argument advanced at the hearing, that the rider was to cover partial loss, is without point since under the policy without the rider plaintiff was insured against partial loss as well as against total loss caused by stranding, but, as we have seen, not against loss from delay incident to stranding. If, therefore, we thought there were any doubt as to the interpretation to be placed upon the policy, we should think, as did the judge below, that the construction which the parties themselves placed upon it would determine the question involved against plaintiff's contention. *Brooklyn Life Ins. Co.* v. *Dutcher,* 95 U. S. 269, 273, 24 L. Ed. 410; *Williston on Contracts,* Sec. 623" (R., p. 37).

POINT III.

The judgment and order of the United States Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court of the United States for the District of Maryland, should be affirmed.

Dated, November 30, 1937.

Respectfully submitted,

D. ROGER ENGLAR,
FRANK B. OBER,
MARTIN DETELS,
Counsel for Respondent.

P. 1-9

SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1937.

Lanasa Fruit Steamship and Importing Company, Inc., Petitioner, *vs.* Universal Insurance Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 10, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This action was brought upon a policy of marine insurance. Judgment for respondent was affirmed by the Circuit Court of Appeals (89 F. (2d) 545) and certiorari was granted. 302 U. S. —.

Petitioner was the owner of a cargo of bananas aboard the Norwegian steamship "Smaragd". While proceeding up Chesapeake Bay to Baltimore on July 21, 1935, the vessel stranded and before she could be floated the entire cargo of bananas became overripe and rotted causing a total loss. Petitioner held a floating policy of insurance which had been issued by respondent on June 23, 1933. The general coverage clause of the policy embraced perils of the sea.

To the declaration setting forth these facts and claiming that the loss was within the coverage of the policy, respondent filed four pleas, the first two pleading the general issue and the two others being special pleas. Petitioner joined issue on the first and second pleas and demurred to the third and fourth. The District Court overruled the demurrer to the third plea and, as that decision was considered by the parties and the court to be conclusive of the issue, final judgment was entered for respondent.

The third plea, thus sustained, set forth a rider which, for an additional premium, had been added to the policy on April 4, 1934, and had been canceled on January 25, 1935, before the loss occurred. The rider amended the policy so as to provide that the coverage should be "free of particular average unless the vessel be stranded, sunk, burned, on fire or in collision, in any, all or several of which events the insurers are liable for such loss by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom". The insurers

also assumed liability for such loss in consequence of delay resulting from breakage of shaft, loss of blades from propeller, and derangement or breakage of machinery or rudder and/or stern post, "whether or not the vessel be stranded, sunk, burned or in collision" provided that the loss amounted to ten per cent. after deducting five per cent. for ordinary loss.

On the cancellation of the rider it was agreed that the policy should have the same coverage as prior thereto, and the premium rate was reduced from 60 cents to the original rate of 25 cents on the $100 of risk. 89 F. (2d) p. 546.

In affirming the judgment, the Circuit Court of Appeals observed that the judgment had been entered upon the pleadings and that petitioner had conceded that its right to recover depended upon the construction of the policy. 89 F. (2d) pp. 545, 546. The appellate court then examined the policy and after a review of authorities in this country and in England held that the loss was not within the general coverage clause relating to perils of the sea. The court in concluding its opinion referred to the rider as showing that the parties had interpreted that clause in the same way. *Id.*, p. 549. We granted certiorari because of the importance of the principal question thus determined by the Court of Appeals, a question which had not been decided by this Court and as to which the decisions of other courts were said to be in conflict.

We are met by two preliminary questions. The first of these is with respect to the sufficiency of the declaration. It is suggested that the declaration does not allege that the bananas were shipped in sound condition and that they would have been merchantable at the end of a normal voyage, and that there is no allegation as to the duration of the delay. It does not appear that these questions were raised in the District Court and they were not dealt with by the Court of Appeals, which evidently assumed the sufficiency of the declaration to present the main question as to the interpretation of the general coverage clause. Both courts below have decided the case upon the assumption that the fruit was in sound condition when shipped and would have been merchantable at the end of the voyage had it not been for the stranding and the consequent delay. In view of this course of proceedings we make the same assumption. If any question as to the condition of the cargo or length of the delay and its effect had been presented in the trial court,

it might have been met by amendment of the declaration and the issue could have been tried; and if the main question, upon the assumption stated, has been wrongly decided and the case is remanded to the District Court, there will still be opportunity to try any other issues of fact or law which may properly be presented.

The other preliminary question is with respect to the effect of the rider above mentioned. We do not regard that endorsement as either controlling or persuasive. Manifestly it did not affect the application of the general coverage clause. That clause had been in effect for a long period before the rider and by express agreement that clause remained in effect after the rider was canceled. The rider covered losses not embraced in the marine perils against which the policy insured and it also covered losses which were already covered by the policy, and there was room for difference of opinion as to exactly how far the rider overlapped. The actual views of the parties when the rider was obtained and the reasons for its cancellation are not shown with any definiteness. For all that appears the insured may have been advised and may have assumed that the coverage clause of the policy gave protection in such a case as is here involved and may not have desired to continue to pay the additional premium for the other losses described. We are not called upon to speculate as to the state of mind of the insured's officers and one asserted ambiguity is not to be cured by another. If the general coverage clause permits recovery, we see nothing to defeat it in what was done in connection with the rider.

Petitioner thus states the main question broadly: Does the general clause of the marine cargo insurance policy, insuring for loss caused by perils of the sea, cover a loss where a marine peril, viz. stranding, has so delayed the voyage that the cargo has become a total loss?

Respondent contends (1) that deterioration of perishable cargo caused through inherent vice while the vessel is delayed by a sea peril, is not, without more, covered under a marine policy which does not expressly insure against such deterioration; and (2) that in order to recover for such deterioration it must be shown that the adventure was not merely delayed but frustrated by reason of the vessel's forced departure from the course of her voyage, as, for example, where the vessel has put into a port of distress and remained there for a period which constituted a virtual abandonment or frustration of the voyage.

In considering these contentions, we start with the fact that the vessel, while proceeding up Chesapeake Bay, stranded. That is alleged and conceded. Stranding is a peril of the sea. *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 438; *Richelieu & Ontario Navigation Company* v. *Boston Marine Insurance Co.*, 136 U. S. 408, 421; Arnould on Marine Insurance, 11th ed., sec. 816; Winter on Marine Insurance, 2d ed., p. 156. Loss through stranding was within the coverage of the policy. This, as the court below observed, was expressly recognized in the warranties against particular average in which loss by stranding was excepted. 89 F. (2d) pp. 546, 547. And it was the stranding which caused the delay. The case is not one of the mere lengthening of a voyage due to the ordinary vicissitudes of wind and wave against which the underwriter does not insure (*Jordan* v. *Warren Insurance Co.*, 1 Story, 342, 352) and we are not called upon to determine in what circumstances other than those now presented delay may be considered to be due to a peril of the sea within the meaning of the policy.

The cargo was perishable fruit. Respondent insists that its decay was caused by inherent vice which began to operate as soon as the fruit was picked. But, although perishable, the cargo was insured for the voyage against sea perils and the sole question is whether a sea peril caused the loss. As we have said, we must assume for the present purpose, in view of the way in which the case was presented and determined below, that the fruit was sound when shipped and would have been merchantable on arrival after a normal voyage, and that had it not been for the delay due to the stranding of the vessel, the loss would not have occurred despite the perishable nature of the cargo.

We are not impressed by the argument that to permit recovery it must appear that the adventure was not merely delayed but that it was frustrated through a forced departure of the vessel from the course of her voyage and the putting into a port of distress. So far as the cargo in question was concerned, the adventure was frustrated by the stranding and the cargo became a total loss before the vessel could be floated. That loss was just as complete as if the vessel had been compelled to put into a port and the voyage had then been abandoned.

The sole question is whether in these circumstances the stranding should be regarded as the proximate cause of the loss. Respondent contends that decay or inherent vice was the proximate cause. It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result. *Insurance Company* v. *Boon*, 95 U. S. 117, 130; Arnould on Insurance, 11th ed., sec. 783.

The subject was discussed in an illuminating way by Lord Shaw in his judgment in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society*, [1918] A. C. 350, 368-371. He said:

"To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

"What does 'proximate' here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed".

There, in a policy insuring a ship, there was a warranty of exception in case of hostilities or warlike operations, and the question was whether the loss of the vessel fell within the exception. The vessel was torpedoed and sustained severe injuries but succeeded in making the outer harbor of the port of Havre. Notwithstanding all efforts by pumping and otherwise, she bumped, broke her back, and sank. It was contended that she perished by a peril of the sea because sea water entered the gash in her side which the torpedo made. The entry of the sea water was indeed a peril of the sea and was proximate in time to the sinking. But as "proximate cause is an expression referring to the efficiency as an operating

factor upon the result" it was held that "the real efficient cause" of the sinking of the vessel was that she was torpedoed and hence that the loss was within the exception.

In the *Leyland* case the House of Lords approved the decision of the Court of Appeal in *Reischer* v. *Borwick* [1894] 2 Q. B. 548, where the policy covered collision with any object but excluded perils of the sea. The ship struck a snag which made a hole in her. She was anchored and the leak was temporarily plugged. Then, while she was being towed towards the nearest dock for repair, the water burst through the hole and she had to be run aground and abandoned. The contention was that the proximate cause of the damage was the excepted marine peril of the inrush of the sea water. But the Court of Appeal held that the proximate cause was the collision with the snag.

The same principle applies although within the network of causation there may be found the operation of natural forces to which a disaster, within the coverage of the policy, has given play. The decision of Justice Story in *Magoun* v. *New England Marine Insurance Company,* 1 Story 157, is an illustration. In that case the question was whether the loss was due to a restraint and detainment of government within the words of a policy insuring the vessel and freight. It appeared that there had been an arrest and detainment by the authorities of New Granada; that the vessel had been restored, but that, when restored, it was found, from her long exposure to the weather in a hot climate, in an open roadstead, that she had been so damaged that she could not perform the voyage without great repairs which would cost more than the vessel was worth; that hides belonging to the cargo had become rotten and were thrown overboard and that no other vessel could be found to carry the residue of the cargo to destination. The vessel was accordingly abandoned to the underwriters, and Justice Story held that the abandonment was good and the underwriters were liable for a total loss. He said:

"The argument is that the injury to the vessel, by the long delay and exposure to the climate, was the immediate cause of the loss, and the seizure and detainment the remote cause only; and that, therefore, the rule applies, *Causa proxima, non remota, spectatur,* and the underwriters are not liable for injury by mere wear and tear, or by delays in the voyage, or by worms, or by exposure to the climate. But it appears to me, that this is not a correct ex-

position of the rule. All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself".

In support, Justice Story referred to the decision of the Court in *Peters* v. *Warren Insurance Co.,* 14 Pet. 99, in which he delivered the opinion. In that case he put the following illustration (p. 110):

"Suppose a perishable cargo is greatly damaged by the perils of the sea, and it should, in consequence thereof, long afterwards, and before arrival at the port of destination, become gradually so putrescent as to be required to be thrown overboard for the safety of the crew: the immediate cause of the loss would be the act of the master and crew; but there is no doubt that the underwriters would be liable for a total loss, upon the ground that the operative cause was the perils of the sea".

And in the same case, Justice Story took occasion to observe that if there be any commercial contract, which, more than any other, "requires the application of sound common sense and practical reasoning in the exposition of it", it is "certainly a policy of insurance." *Id.,* p. 109.

If we apply this principle of the "real efficient cause" to the instant case, it can hardly be doubted that upon the facts assumed the loss would be within the coverage of the policy. Indeed this is not strongly contested, but it is insisted that the case is controlled by certain precedents to which we should give heed in dealing with an ancient form of words. These precedents are found in certain English cases to which the Circuit Court of Appeals referred. The court recognized that a number of American cases had taken a different view, but thought that, in the absence of a contrary decision by this Court or any federal court, the cited English cases should be followed in the view that in the field of marine insurance "it is highly desirable that our decisions be kept in harmony with those of England". 89 F. (2d) p. 549.

Reference is made to the case of *Taylor* v. *Dunbar,* L. R. 4 C. P. 206. There meat shipped at Hamburgh for London was delayed on the voyage by tempestuous weather and solely by reason of such delay became putrid and was necessarily thrown overboard. The court held that it was not a loss by perils of the sea. Judge Keating said that the facts showed "beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of

the voyage", and "that delay was occasioned by tempestuous weather". But he held "that a loss by the unexpected duration of the voyage, though that be caused by perils of the sea", did not entitle the assured to recover. Judge Montague Smith, concurring, said that if it were held "that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea", the court would "be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods but in the case of goods of all other descriptions".

The case of *Pink* v. *Fleming*, L. R. 25 Q. B. D. 396, upon which chief reliance is placed, was a case of collision. It was necessary for the damaged ship to put into a port for repairs and for that purpose to discharge a portion of the goods insured, consisting of fruit. The goods were reshipped but on arrival it was found that being of a perishable nature they had been damaged by the handling necessary for their discharge and reshipment and by the delay. The Court of Appeal held that the collision was not the proximate cause of the loss and that there could be no recovery on the policy. Lord Esher said:

"The collision may be said to have been a cause, and an effective cause, of the ship's putting into a port and of repairs being necessary. For the purpose of such repairs it was necessary to remove the fruit, and such removal necessarily caused damage to it. The agent, however, which proximately caused the damage to the fruit was the handling, though no doubt the cause of the handling was the repairs, and the cause of the repairs was the collision. According to the English law of marine insurance only the last cause can be regarded. There is nothing in the policy to say that the underwriters will be liable for loss occasioned by that. To connect the loss with any peril mentioned in the policy the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do".

The court thought that the case was governed by *Taylor* v. *Dunbar, supra.* Lord Esher added—"With regard to the American authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them".[1]

[1] As to other English decisions cited below, Tatham *v.* Hodgson, 6 T. R. 656, and Inman Steamship Co. *v.* Bischoff, L. R. 7 App. Cas. 670, see Arnould on Marine Insurance, 11th ed., secs. 781, 785.

It seems that neither of these cases went to the House of Lords, and we find it impossible to reconcile Lord Esher's ruling—"that according to the English law of marine insurance only the last cause can be regarded"—with the elaborate exposition of the doctrine of proximate cause which has been given by the House of Lords in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society, supra,* from which we have quoted. And it is recognized in England that "Passages in Lord Esher's judgment in *Pink* v. *Fleming* . . . to the effect that only the cause last in time can be looked to, cannot now be supported." Arnould on Marine Insurance, 11th ed., sec. 783, *note* (*r*). So far as the English rule, however, relates to losses, on ship or goods, "proximately caused by delay", "although the delay be caused by a peril insured against", it has been embodied in statute which apparently applies to all goods, perishable or otherwise, unless the policy otherwise provides. That statute of course is controlling in relation to English practice in that class of cases. Marine Insurance Act, 1906, sec. 55 (2) (b). L. R. Statutes, 6 Edward VII, p. 227. There is no statute applicable here which so restricts the doctrine of proximate cause, as we understand it and as it is set forth in the *Leyland* case, and the weight of American authority is contrary to the doctrine of *Pink* v. *Fleming.*

In *Williams* v. *Smith,* 2 Caines 1 (1804), the action was on a policy of insurance covering a cargo consisting chiefly of naval stores, including tar in barrels, on a voyage from New York to Algiers. The vessel experienced severe weather which resulted in such serious damage that it was compelled to put into Cadiz as a port of distress. There more than half of her lading was taken out and the vessel moved to the usual place for repairing. While there an epidemic fever broke out which prevented all business and made it impossible to obtain permits for taking the cargo from the place where it had been landed. Meanwhile the vessel was driven to sea by a storm and sustained further injuries and on returning to Cadiz it was found that the cargo, both on shore and on board, from the heat of the climate and violence of the gale, was deteriorated more than one half of its original value. As the whole would not have produced enough to fit the ship for the completion of her voyage, the vessel and the cargo were abandoned to the underwriters. The

court charged the jury, among other things, that "any damages which arose in consequence of the fever at Cadiz, were within the perils of the policy". The jury brought in a verdict for a total loss. The court denied a new trial, Judge Kent stating in his opinion "that the damage resulting from the pestilence at Cadiz" was covered by the policy. The court found it unnecessary to decide "whether a pestilence is a peril direct within the policy", but held that it formed "a sound excuse for delay at Cadiz" and "if the consequence of that delay was a deterioration of the subject insured, the insurer must be answerable for the loss".

In *Tudor* v. *New England Marine Insurance Company,* 12 Cush. 554, the suit was upon a policy of insurance on a cargo of ice shipped from Boston to Calcutta. It was agreed that the ice was properly packed and surrounded with non-conductors of heat. Under the stipulations of the policy, the insurer could be liable, if at all, only for a total loss. There was also a clause that there should be no liability "for ice melting in consequence of putting into port". By perils of the sea, the vessel sprung aleak which increased and it became necessary to put away for a port. On taking out her cargo, in order to ascertain her condition and the practicability of repairs, it was found that the ice had settled, a portion of it having been melted by the sea water which had come in contact with it by reason of the leak. The ice was taken out and sold for a very small sum in comparison with its estimated value at the port of delivery. The voyage was abandoned. It was denied that the loss was occasioned by a peril of the sea. The insured had judgment for a total loss. The court considered it to be well settled that if an article insured as free from average be "placed in such a condition, that in consequence of inevitable deterioration or decay, it cannot be carried to the port of destination, but will necessarily, before the completion of the voyage, be wholly destroyed, and it is accordingly sold at an intermediate port", this would constitute a total loss within the meaning of the policy. The court also held that the exception of the risk of ice "melting in consequence of putting into port" did not include "a loss occasioned by the melting of the ice from other causes, or a combination of other causes". The real cause was the injury to the vessel which made it necessary to take out the ice in a port in the tropics. See, also, *Musgrave* v. *Mannheim Insurance Co.,* 32 Nova Scotia Rep. 405.

Cory v. *Boylston Insurance Company*, 107 Mass. 140, is cited by respondent as an answer to the *Tudor* case, but the latter was not overruled or even mentioned. In the *Cory* case a vessel with wine on board met with severe gales which prolonged her voyage and caused her to ship much sea water, and upon her arrival at the port of destination the cases of wine were found to be more or less wet either by the sea water or by the steam and dampness generated in the hold by the presence of the sea water and the changes of climate through which the vessel had passed. The case was controlled by special provisions of the policy. The policy provided that the insurers should not be liable for loss by leakage unless occasioned by stranding or collision, or "for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, musty or mouldy, unless the same be caused by actual contact of sea water with the articles damaged, occasioned by sea peril". The court thought that the latter clause was inserted with a knowledge of the decisions in *Baker* v. *Manufacturers' Insurance Co.*, 12 Gray 603, and *Montoya* v. *London Assurance Co.*, 6 Exch. 451. To bring a case within that clause the court held that it was not enough "that perils of the sea should be the efficient, and, within the rule laid down in the previous decisions, the proximate cause, by which the sea water was shipped", but that the sea water "must come into actual contact with the articles, for the damage to which the underwriters are sought to be charged".

Respondent also cites *Perry* v. *Cobb*, 88 Me. 435, where the insurance was on a cargo of lime shipped by a brig from Rockland to New York. The voyage was prolonged on account of rough weather but the vessel arrived tight and only slightly damaged. No sea water had reached the cargo unless in a few instances where a hatch had been taken off or once when the cabin was flooded. That damage was far below the partial loss which had been excepted from the coverage. The remaining damage was "from the shrinking of the staves of the barrels and slacking up of the cooperage", causing a loss of contents and making the barrels insecure for hoisting,—a condition which was claimed to have resulted from the rolling and pitching of the vessel caused by the storms of an unusually protracted voyage. The court said that "All authorities agree that a protracted voyage is not a sea peril within a marine policy, because it is not an unusual event, but one of the natural incidents to sea

transit"; that the evidence was conflicting "as to the proximate cause for the condition of the cargo upon its arrival"; that the associates, who in this case had insured each other and to whom it was agreed that the question of liability should be submitted, were men of large experience in burning and shipping lime; and that their decision against the plaintiff "must have great weight upon the fact as to whether the condition of the cargo, upon its arrival in New York, was other than what might have been expected from ordinary sea weather at that time of year", without any "unusual sea peril". The conclusion was that the principal damage to the cargo came "from its own inherent qualities, excited by the long continued transit". *Id.*, pp. 449, 450.

In the case of *Bond* v. *The Superb*, 1 Wall. Jr. 355, 3 Fed. Cas. 845, also cited by respondent and the court below, the decision of Mr. Justice Grier at circuit turned upon the question of liability for general average and in this view had distinguishing features.

Fourteen years ago a case closely resembling the one at bar came before the New York courts. *Brandyce* v. *United States Lloyds* (*The Corsicana*), 207 App. Div. 665, 239 N. Y. 573. The action was upon policies covering a cargo of potatoes insured against perils of the sea. The vessel, in consequence of a collision at sea with some unknown object, was compelled to put into Charleston for repairs where it was found necessary to discharge the cargo. After repairs the vessel resumed her voyage but, on account of the delay, the potatoes because of sprouting and rot had to be sold. They were not injured directly in the collision or touched by sea water. The precise question presented was "whether loss by natural deterioration, during a delay in the voyage caused by a sea peril, is a loss by sea perils within the meaning and intent of the policy of insurance". The Appellate Division reviewed the authorities in England and in this country. The court held that mere delay on the voyage, as a result of which cargo is spoiled or damaged, was not a ground for recovery. But the court found that the collision, the sea peril insured against, was the real cause of the loss. The court said: "The evidence indicates that if the *Corsicana* had not been damaged by reason of sea perils, the potatoes would have arrived sound. The proximate cause of the loss, therefore, was the sea peril because it was the *efficient* dominant cause which, although incidentally involving *delay*, placed the cargo in such a condition

that, because of inevitable deterioration or decay, it could not be reshipped and carried to its destination". The Court of Appeals of New York stated the question in the same way and affirmed the judgment.

We lay on one side cases of protracted voyages caused by storms and the special questions to which their varied circumstances give rise. Such a case is not before us. The instant case is one of stranding, a sea peril insured against, and we think that the well-settled doctrine of proximate cause, meaning the real efficient cause of the loss, requires the conclusion that, upon the assumptions of fact we stated at the outset, the loss of the cargo was within the general coverage clause of the policy.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice McREYNOLDS and Mr. Justice SUTHERLAND are of opinion that the case was correctly decided by the court below on grounds adequately stated.

A true copy.

Test:

Clerk, Supreme Court, U. S.